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RUFUS CHOATE.[1]

The Works of Rufus Choate with a Memoir of his Life, by Samuel Gilman Brown, Professor in Dartmouth College. In Two Volumes. Boston: Little, Brown and Company. 1862.

ANY one resorting to the courts held in Suffolk county, Massachusetts, whether high or low, State or national, from the year 1834 to 1859, must have been struck with one advocate, remarkable alike for his personal appearance, his melodious voice, glowing elocution, and speaking gesture. Nor could any one, during this period, have been at all familiar with the sessions of the Supreme Court at Washington, or the courts of Massachusetts in any of the counties, without meeting this remarkable person more than once: and to see him, though but once, and even when wrapped in his dignified and stately silence, was to remember him for life. This advocate was Rufus Choate.

In height, he towered full six feet; and his finely proportioned figure indicated a constitution hardy and vigorous. The well developed head was covered with close thickly curling hair. His dark, deeply marked features, and restless eye, showed that his frame of iron was the habitation of a spirit of nervous energy and impulse. Such was his expression even in repose; but when lighted up with the fires of eloquence, flashing from his dark eye and features, while his voice flowed with a mellifluous sweetness which might have made applicable to him the compliment paid to Plato, that bees swarmed on his lips, and

> "The hand
> Sang with the voice,"

the effect was irresistibly charming. Nor was his oratory the mere outside flash of display, unsustained by well disciplined powers of thought. What he said, if not truth, had always a specious, deeply studied verisimilitude: and the longer we listened, the more we wondered and admired. His manner complied, more than that of any speaker we have heard, with Demosthenes' first, second, and third

[1] This article is from the pen of Richard F. Fuller, Esq.—EDS.

postulate: action, action, action. His gesticulation, always fervid, was often passionate and sometimes almost frantic. The *tout ensemble* of the orator was entirely original and unique, without precedent, and beyond the power of copying or repetition. The gaze of his roving, deep black eye, seeming the hiding place of all things, was wild and sibylline. His words, as they caught the ear, were glowing and gorgeous. The strain of his thought, always discriminating, seemed sometimes subtle enough to

> "——— Sever and divide
> A hair 'twixt north and north-west side."[1]

His argument and imagery were often cumulated in an impetuous climax of sentences almost endless; very effective, when driven home by his voice, gesture, and mien of inspiration; yet fairly putting one out of breath, when read afterward as plain prose.

Choate's oratory was so unlike that of classic fame and living reputation, and so akin to the impetuous climax of Carlyle, the subtle thought of Coleridge, and the beautiful glow of Emerson, that he impressed one as belonging to the same constellation of modern genius; and as having shot from his natal sphere, to shed an unusual radiance upon the forum. Dryness and dullness took their flight from thence, when he appeared, like vapors from the morning sun. His entrance was a signal for every face to assume a brighter aspect. The judges seemed relieved by the anticipated ease he would afford to the heaviness of legal questions. Reluctant jurors were ready to retract their excuses: and every brow mantled with expectation; the very *Oyez!* of the crier losing its dolorous tone.

Choate's fort was with the jury; because, with them, his eloquence had the power of fascination and enchantment; while, with the court he could only bring to bear effectively the elaborate reasoning, which was always an element, though, in jury trials, only one element of his oratory. Sometimes, indeed, he addressed the court with an ulterior view to the jury; much as an actor speaks to his colleague, while aiming at the audience. On such occasions, he fairly showered the court with bouquets of rhetoric, and even appealed with passionate vehemence to considerations which could have no weight with the court, such as the poverty of his client, the hardship of his case, the overbearing or overreaching attributed to the adverse party. Nor did he hesitate to press upon the court propositions of law, which they could not sanction, when their adverse ruling might lead the jury to believe that the technicalities of the law restricted the equities of his case. We remember, when acting as his junior in a cause, our surprise at his urging such a

[1] This quotation will be found in the work which forms the caption of this article, vol. i. p. 505. Future references in the notes to this article are made to the same book, unless otherwise expressed.

point, till he remarked to us aside, that he believed he had secured the sympathies of several of the jurors. "I take care," said he, "if anything comes up in a cause which is damaging us with the jury, to interrupt it by some address to the court, which shall show the jury our answer to it, before it becomes indelibly impressed upon their attention." At one time, when he was retained to defend a series of causes under a new and not entirely popular statute, where the fact was all against him, and the statute itself impregnable in law, he made a vehement onslaught upon it, in an address to the court, blending with his specious, elaborate, and subtle reasoning, his eloquent appeals to other considerations, calculated to bias the country, but not admissible by the court. He was overruled, of course. But the jury were persuaded that the statute either was not law or ought not to be law; and they could not be induced to convict under it.

The judges were sometimes restive in the theatrical role they were made to play; and occasionally checked the advocate: but he always parried the judicial rebuke with inimitable grace and skill. On one occasion, when he was urging upon the court an untenable construction of the language of an officer's return, and the court interrupted him with a very plain intimation that the view he advanced was unsound, he gracefully retreated from his position with the remark, "It may be so, your Honor, but it must be confessed, he has greatly *overworked the participle*."[1]

It required no small skill and power, after Choate had closed to the jury, for the judge to duly impress his charge upon them, while the echoes of forensic eloquence were still ringing in their thought. The spell continued, after the voice had ceased.

> "The angel ended; and, in Adam's ear,
> So charming left his voice, that he awhile,
> Thought him still speaking, still stood fixed to hear."

Choate sometimes chose to make the issue savor of a personal contest between himself and the opposing counsel. We remember, in a suit he brought against the city of Boston, defended by Mr. Pickering, then city solicitor, a gentleman not only remarkable for professional learning and accomplishments, but also for a very erect figure, Choate had particularly desired to obtain in advance a certain paper to be put into the case by the defence, in order to con and sleep over its important contents: but the solicitor had no fancy for allowing him such an opportunity for applying his eloquent casuistry to the document, and firmly declined to lend it, in the usual manner of professional courtesy. This circumstance Choate, in closing, dwelt upon very effectively. "I asked the gentleman,"

[1] Essays by E. P. Whipple, vol. ii. p. 167.

said he, "I asked him again and again for permission to inspect that document, according to the usage of professional courtesy, and he repeatedly declined, with more than the usual"—(here he looked with flashing eyes upon his opponent, as if seeking for an apt expression, while the latter drew himself up to his full height, with offended dignity)—"*perpendicularity* of that gentleman!"

In one of these personal contests, the jury seemed to forget that they were deciding aught save the respective merits of the opposing counsel: for when asked if they had found a verdict, the foreman eagerly replied, "We have: *it is for Choate!*"

With his consummate strategy, he often led the other party into the trial of a false issue, where the true merits of the cause were against him. We remember, in the trial of a patent case relating to carpets, which had lasted several days and was still in progress, asking his associate how it was going. "O, pretty well," was the reply: "we have no case; but one of the witnesses on the other side testified that their machine made better carpets than ours; and we have been trying *that;* and shall beat them."

Equally skilful was he in enveloping a case *in nubibus*. A merchant of high standing and intelligence, at the close of a cause defended by Choate, in which he had served as a juror, when we asked him how it resulted, replied: "We were a fortnight in the trial of the cause; and when we retired to the jury room, we at once decided that we knew nothing whatever about it; and so, of course, found for the defendant."

In the trial of a nuisance case, at East Cambridge, where Choate was for the defendant, and his client was convicted, one of the jury we happened to know, told us, that the first thing they did, on retiring, was to agree to put out of the case all that Choate had said. No higher compliment could have been paid to his unanswerable argument.

He was dramatic in his trials, like some tragedian, who had wandered from the stage, and half forgot he was not still in the theatre; and fancy often furnished largely the capital for his argument. We remember well a cause he tried as our senior; a damage case, where the amount being unliquidated, full scope was furnished for his appeals to the sympathies of the jury. Our client was a single man, not quite of middle age. Choate had never asked at all about his circumstances, and no information had been given him on the subject. He took us, therefore, wholly by surprise, when in his pathetic peroration, he held up a moving picture of our client's young family, the partner of his bosom, and the tender offspring, whose honor and happiness were staked upon that day's issue. We were obliged to gnaw our lips, to suppress the risibles: but the jury were evidently much affected; the judge looked grave; the oppos-

ing counsel wore a blank expression; and our client seemed almost overwhelmed, never having before appreciated his misfortunes.

Choate possessed a power of reading physiognomy; which, we fancy, few fortune-tellers ever matched. In the progress of a trial he would tell us, that such and such jurors were well affected, such and such others were differently inclined; reading in their silent faces what was passing in their minds, as if they had windows in their breasts. We looked in vain for any indication of what he told us, in the twelve grave impassive countenances ranged upon the panel: but inquiry after the trial verified his statement. He knew exactly the impression he was making upon the jury, whose features like an open legible book he kept constantly in his eye, ever shaping his address to the work he had to accomplish in their minds. Nor was this keen and seerlike faculty exercised only upon the jury; he took in with his restless eye all in the court-room, as if those outside of the panel were to be impressed also, as having some reflex or sympathetic influence upon the twelve jurors. "As he was once addressing a jury, a woman in a distant part of the court-room rose and went out, with some rustling of silk. Being asked afterwards if he noticed it, 'Noticed it!' he said, 'I thought forty battalions were moving.'"[1]

We remember a criminal cause he defended in the Municipal Court, in Boston, where he departed, in a striking manner, from his usual complaisance with the jury. On this occasion, he singled out one of them, a man of influence in the community, in whose face he read an adverse inclination, and assailed him with a withering torrent of invective, charging him with having shut his ears to evidence and argument, and already having decided the cause, before it was closed. The juryman was abashed; and, on withdrawing to the jury-room, felt compelled to vindicate himself from this attack, and show that it had no foundation, and had not influenced him unfavorably, by voting for an acquittal. Had he done otherwise, his influence was destroyed and would have effected nothing. There was a verdict for the defendant. When we spoke to Choate about the matter, his remark was, "You must not attempt that thing unless you succeed." Few advocates, indeed, could carry a hostile juryman by storm.

His power of reading character, as well as mental states, from the countenance, he often availed himself of, in challenging jurors in capital cases. We remember, in the Tirrel case, where he proposed to administer to the jury the novel specific of somnambulism, it struck us in the sifting process of the challenge, that a quick cast of countenance seemed no recommendation, and that the jurors he allowed to take their seats on the panel looked less intelligent than

[1] Vol. i. p. 286.

those he challenged. They appeared, some of them, like gentlemen who fix a horse-shoe over their threshold to charm away the witches.

We had retained Choate in a suit for divorce *a mensa et thoro*, brought by the wife, in which the husband's answer charged her with criminality; and the woman expressed apprehensions lest he would sustain the allegation by perjured testimony. On communicating this to our leader, he replied, "Not the least danger of perjury: the shield of truth will parry that." He expressed a desire to see the woman; doubtless, that he might gather from her face and deportment, whether it was truth or falsehood she dreaded. In company with her mother, she had an interview with him. He did not communicate his impressions; but when the trial came on, though he was liberally retained, he could not be induced to take his place at the counsel's table; declaring he was not needed, and taking a back seat as "a looker-on in Venice." We were not sure whether he deemed his assistance supererogatory, or did not like the complexion of the case, and was "jealous on honor," as he sometimes seemed to be, after his achievements in the Tirrel cause had brought upon him many left-handed compliments from the public. The wife easily prevailed, having the husband at advantage, as he lacked the "sinews of war," which were liberally furnished to her by friends; and he adduced little evidence beyond those "lover's perjuries" at which "they say Jove laughs."[1]

When Choate's mind was not fully concentrated on some effort of power, he would employ himself in reading the secrets of the life of parties or jurors in the lines of the face, or the betrayal of their deportment. In a case we tried with him, seeking to hold a man for conspiracy to defraud his creditors, he told us the man must be subject to the gross passions. The remark surprised us; both because we supposed him to have been absorbed, as we had been, in the trial, and because nothing in the evidence had furnished any clue to his observation. Yet, hardly a year afterward, we learned that the man was indicted for adultery. On another occasion, "After an interview with a person who consulted him as to a disgraceful imputation under which he was laboring, he remarked, 'He did it, *he sweats so.*'"[2] Again, "A woman, who had some reputation as a fortune-teller, once came to consult him. She had not proceeded far in her story before she suddenly broke off with the exclamation, 'Take them eyes off of me, Mr. Choate, take them witch eyes off of me, or I can't go on.'"[3]

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[1] *Romeo and Juliet.*—Act 2, sc. 2.
This is a rendering of Ovid:—
Jupiter ex alto perjuria ridet amantum.

[2] Vol. i. p. 289.

[3] Vol. i. p. 313, note.

The only occasion when we knew him to manifest concern about his fees, or even a reasonable interest in the subject, was at the close of a trial, in which the woes of our injured client had exercised his impassioned eloquence. On the jury retiring, he remarked aside that the client would put his property out of his hands to avoid paying counsel fees, and he suggested that an attachment should be immediately laid upon it. This was done; and, singularly enough, the event justified his expectation; and we should have lost our fees, if the lien had not put a collar upon the man's honesty.

Choate's professional character was elevated far above trickery. His word passed current with adverse counsel, as the best security. Yet, in the fair field of forensic diplomacy, in admirable adroitness and legitimate legerdemain, no one could match this magician of the forum. He gave a proof of his dexterity in an equity cause in the United States Circuit Court, which came up, on a plea to the jurisdiction. The State Supreme Court having, at that time, only limited equity powers, many parties were without remedy, unless they could be admitted to sue in the Circuit Court of the United States. We had an instance of this. A man, while laboring under an attack of insanity, purchased land of a neighbor, giving his note for ten thousand dollars as the consideration. When reason returned, he was very desirous to avoid the transaction; but the other party would neither give up the note, nor bring a suit to test its validity. There was no remedy, except in a tribunal clothed with equity powers, to try the issue of insanity, and if found to exist, compel the surrender of the note to be cancelled. This power the State courts did not then possess, and our client was greatly disturbed by the apprehension that the note would not be sought to be enforced, till the proofs of his insanity were lost. He could, it is true, have depositions taken *in perpetuam memoriam*, which would be admissible whenever the case should be tried between the same parties. But he supposed the other party had transferred the note to some unknown person to avoid this testimony. In this quandary, we advised, that, if he became a citizen of another State, he could obtain a remedy in the Circuit Court of the United States: that, if he left the State of Massachusetts, declaring, at the time of his departure, that he so left intending to become a citizen of the State to which he resorted, then such verbal acts, being part of the *res gestæ*, would be competent evidence, in his behalf, on the question of citizenship. He did so; and the suit was brought. The learned counsel for the defence did not fail to raise the question of citizenship by a plea of abatement; there being in fact no hope of defence on the merits. When we were preparing for trial, we ascertained that our client had accompanied his verbal acts, in departing, with certain others, which we had by no means counselled;

and which, we regarded, as giving them a bad and doubtful complexion. It came out, in his deposition, that, on leaving, he made a lease of his homestead to his son for one year, *more or less*. The conveyance being made to his son, from this circumstance, wore somewhat the aspect of an act done for effect, and to be used as testimony: but the "more or less" made it seem, we thought, like the utmost affectation: impliedly saying that the lesser thought he might get launched in his cause, beyond the plea to the jurisdiction, in some indefinite time, and meant then to resume home occupation. The plaintiff's counsel, at any rate, felt a strong apprehension of this: and, on reading that part of the deposition, the voice of the junior dropped a little. Choate immediately called out, "Stop! what was that, Mr. F.? read it again; not too fast!" This was done; while he took down, and underscored every word of it. The defendant's counsel, in closing, made no other comment on the passage than to say, that the plaintiff's counsel seemed to lay great stress upon it; but, for his part, he did not see that it particularly strengthened the plaintiff's case. Choate did not allude to it, at all, in his argument: and the judge, no point having been made upon it, passed it over entirely, in his decision, overruling the defendant's plea to the jurisdiction, and holding him to answer.

In another cause, when we had gained a verdict, a question of law having been saved upon the judge's report, which remained to be put in form, Choate bade us search out Massachusetts decisions coming as near as possible to the point ruled, and put the present ruling in the language of the court in those decisions *verbatim*. We stared a little at the suggestion; but it worked admirably. The opposing counsel did not very seriously object to the terms of the report; and the judge, no doubt, thought the ruling had the judicial flow, and was about what he should and did lay down as the law. When the cause came up for argument, it was shown by citing honored Massachusetts decisions, that the court had already decided the same point, and, by a remarkable coincidence, in the same words.

Choate delighted to advocate critical and desperate cases. It has been stated that Daniel Webster was by no means so powerful in causes opposed to his own convictions. This, on the other hand, has been denied. However it may have been in his case, Choate certainly appeared to much greater advantage, when his side of the case seemed critical or desperate. His manner was comparatively tame in a strong case; and the trial of it appeared to afford him little excitement or pleasure. But, in a desperate case, he was in his element; his ingenious spirit revelled in delight, as he put forth his mighty powers to move heaven and earth for a verdict. It was on this account, that a great many hard cases were brought to him: which, though with inadequate and doubtful pay, seemed to please

him more than the rich retainers of wealthy corporations. Numbers among his clients breathed the free air, and enjoyed exemption from public usefulness in the penal institutions, or perhaps life itself, "only by sufferance of Choate." This was amusingly brought out in a trial, where he was cross-examining a witness who testified to an agreement between himself and another party to embezzle property. The witness stated that he objected to the enterprise as dangerous; but the other met his objection with a suggestion, which the witness appeared unwilling to let out. "Mr. Choate was peremptory, and the scene became interesting. 'Well,' said Dixey at last, 'if you must know, he said that if any trouble came of it we could have Rufus Choate to defend us, and he would get us off if we were caught with the money in our boots.'"[1]

No successful defence of a desperate cause has, perhaps, attracted more attention than the trial of Albert J. Tirrel for the murder of a woman named Bickford. It was beyond all controversy that he occupied her apartment on the night of her death. A woman in the next house testified to hearing a scream, a sound like strangling, then a heavy body falling on the floor. Tirrel was heard to descend from the apartment, making a sound as if stifled with smoke. He repaired to a stable, called for a horse to go out of town; said that he had got into trouble; some one had been trying to murder him. He fled to New Orleans, where he was arrested on a requisition for murder, and brought home to be tried. The apartment of the woman was found fired, and her body on the floor, partially burned. Some of Tirrel's clothes were found there; a basin of water mixed with blood; a pool of blood was on the bed; a lamp stained as if by a bloody hand. The woman's throat was cut to the bone, the head being almost entirely severed; and a bloody razor was near by.

One would think such a case as this overwhelming. The woman had been murdered, and Tirrel was there when it was done, and not the slightest evidence of the presence of another person. The woman did not murder herself; for, so deep a cut could not have been inflicted by her own hand: nor would she have screamed or made a noise like strangling, in the act of suicide: nor stained the water in the wash bowl with blood: nor marked the lamp with the crimson grasp of her hand: nor set herself on fire, afterward. Nor would Tirrel, under such circumstances, have failed to alarm the household, or fled to New Orleans.

Overwhelming as this evidence was, it rather exhilarated than depressed the great advocate. He coiled several strands into his defence, so ingeniously woven together, that each tended to conceal the other's weakness. Some one else might have done it: it

[1] Vol. i. p. 296.

might have been suicide: it might have been *somnambulism:* the parties were bad characters; and the lax veracity of the witnesses wavered under Choate's powerful cross-examination. A cloud of mystery was gradually engendered and drawn over the frightful scene, and enveloped it in seeming doubt. Somnambulism really was the only defence. On this head, it appeared that Tirrel, like Macbeth, had sometimes started strangely in his sleep; and perhaps for similar reasons. One witness, of a powerful imagination, thought Tirrel, when he obtained the horse for his retreat, appeared like one waking from a dream. The jury, however, were ashamed to own the mesmerizing influence of the plea of somnambulism; and professed to arrive at their verdict of not guilty, without reference to it.

The peculiar tact, perception, dexterity and fervor which characterized Choate's genius, ought not to make us unmindful of other great, and even greater, qualities, which he combined with them. His discrimination was keen; his reasoning powerful; and his method original. He availed himself eagerly of adjudicated cases, and the points and suggestions of his associates. There was, it is true, little trace, in the gold embroidery of his argument, of aught borrowed from his associate's brief. Perhaps it benefitted him, however, by stimulating his thought and starting him on new trails; perhaps, in his new combination, the borrowed suggestion was hidden from view.

As, according to the aphorism of old Nestor, the gods do not confer all their gifts upon one man, Choate's rhetoric for a time indisposed the public, and even the profession, to attribute to him great reasoning powers. But, the glitter of his style could not long conceal the keen edge and broad sweep of his logic. As he advanced in practice, he gradually, when arguing law questions to the full bench, without the stimulus of a jury, confined himself more and more to plain, unvarnished demonstration; the weight of which was universally acknowledged. In deliberative bodies he sometimes assumed the same style, seldom ornamenting his thought with imagery, or gorgeous and startling expressions. Of this character is his admirable and unanswerable argument on the Judicial Tenure, delivered in the Constitutional Convention of Massachusetts.[1]

Another element of Choate's power was intense application: not merely a mighty effort, when the occasion called; but a whole life of concentrated industry from his college days to his last sickness, all tending to develop the great orator. True, he laid his foundations deep and broad, by no means confined to legal acquirements, but embracing a rich classic culture, and what we believe aided

[1] Vol. ii. p. 284.

him more than all, the devoted reading of the Bible: yet these other studies were only episodes, or rather recreations, renewing his professional energies. Such was his general preparation. The products of his genius were not fruits of the hour alone, but rather results of a life growth and culture. Yet, in addition to this general consecration to industry, his special application was most severe and exhausting. Hercules himself, though readily undertaking occasional tasks of superhuman strength and exertion, one would think might have shrank from an unintermitted effort, without intervals of ease, which the indefatigable Choate seems never to have proposed for himself. No lawyer, with his application, could fail of eminence. His juniors were appalled by the preparation he required of them, and came to realize, in the search for precedents, that "much study is a weariness to the flesh." He himself read and wrote at a standing desk; rose very early, and generally reduced beforehand to his mysterious chirography those glowing sentences, which, when he uttered them, seemed the inspiration of the hour. But, if they did not "smell of the lamp," they were often the fruit of his nightly vigils. He could not say, like Webster, in his reply to Hayne, that he had slept over his speech, "and slept soundly, too." When engaged in an important cause, "The lights were left burning all night in his library, and after retiring he would frequently rise from his bed, and, without dressing, rush to his desk to note rapidly some thought which flashed across his wakeful mind. This was repeated sometimes ten or fifteen times in a night. Being once engaged in the trial of an important case in an inland county of Massachusetts, his room at the tavern happened to open into that of the opposing counsel, who, waking about two o'clock in the morning, was surprised to see a bright light gleaming under and around the loosely fitting door. Supposing that Mr. Choate, who had retired early, might have been taken suddenly ill, he entered his room and found him dressed and standing before a small table which he had placed upon chairs, with four candles upon it, vigorously writing."[1] This method of pinning thoughts upon the wing, and thus preventing the escape of such airy visitants, reminds of Beethoven, who, during the interruptions of composition occasioned by the necessities of life, would yet suspend whatever he was engaged in, to secure a happy suggestion of the moment; sometimes, even running, with his hands dripping from half performed ablutions, to note the thought which had flashed upon him.

Though Choate's "law arguments, and arguments before the legislature, amounted to a yearly average of nearly seventy,"[2] each trial ordinarily occupying more than one day, and many several days, yet he always kept up his reading of law, and especially of

[1] Vol. i. p. 285.

[2] Vol. i. p. 285.

the decisions of the Supreme Judicial Court of Massachusetts. "On the appearance of a new volume of the Massachusetts Reports, he was accustomed to take every important case on which he had not been employed, make a full brief upon each side, draw up a judgment, and, finally, compare his work with the briefs and judgments reported. This was a settled habit for many years before he died."[1] In his diary he says,—"I abide by Blackstone, to which I turn daily, and which I seek more and more indelibly to impress on my memory."[2] He was perpetually weighing and balancing in his mind legal questions which might still be considered open; in turn advocating the pro and con: a habit rather promotive of ingenuity, perception and discrimination, than tending to establish settled convictions. He complimented another lawyer by remarking, "he is a learned man; he knows enough *to doubt*."

Choate found a relief and support in his labors from the spring of a mirthful temperament. Laughter is said to contribute to physical health; and the possession of humor (we do not speak of a foolish levity) is certainly a blessing to a strong and active mind. It indicates also a healthful intellect; and, on this account, as well as for the fountain-like refreshment which Choate must have derived from it, we are pleased with its sparkling presence in his arguments, letters and conversation. He was never loud in his merriment; but his low, musical, repressed laugh indicated a deeper gratification. A fervent midsummer letter to his daughter may be cited as an instance of his genial, playful humor: "Sallie, if it is cool in Lenox—if there is one cool spot; yea, if there is a place where by utmost effort of abstraction, you can think upon the frosty Caucasus; upon the leaves of aspen in motion; upon any mockery or mimicry of coolness and zephyrs, be glad. Our house glows like a furnace; the library seems like a stable of brazen, roasting bulls of Phalaris, tyrant of Agrigentum—of whom you read in De Quincey; and I woo sleep on three beds and a sofa in vain."[3] In another letter to the same daughter, he says,—"I came out of the pestilential court-house to compose an address on *knowledge*, for Danvers.[4] The topic is new, and the thoughts rise slowly and dubious."[5]

In an epistolary rhapsody upon the beauty of the season, he has developed an incident which Anacreon ought not to have omitted in his Ode to Spring; for we believe it is quite as characteristic of the vernal as the autumnal season. "Meanwhile the leaf falls,

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[1] Vol. i. p. 282.
[2] Vol. i. p. 87.
[3] Vol. i. p. 192.
[4] Referring, no doubt, to his Address on the Dedication of the Peabody Institute, contained in vol. i. p. 464.
[5] Vol. i. p. 193.

and the last lark will send up his note of farewell; *the schoolma'am will have recovered*"—[1]

He sometimes used this felicitous humor as an instrument of argument. Thus, in a railroad case, where the petitioner claimed, as an advantage, that the railroad travel would not have to pass over the East Boston Ferry, it was insisted by the opponent's counsel, that the passage of the ferry furnished a valuable opportunity for social greetings. In reply to this, Choate says, "Conceive, gentlemen, the pastoral, touching, pathetic picture of two Salem gentlemen, who have been in the habit of seeing each other a dozen times a day for the last twenty-five years, almost rushing into each other's arms on board the ferry boat;—what transport! We can only regret that such felicity should be so soon broken up by the necessity of running a race against time, or fighting with each other for a seat in the cars."[2]

The relief derived from mirthfulness by Choate himself, as well as afforded to others, was perhaps offset in part, by a trepidation which he habitually felt on embarking in causes, and especially on the eve of his argument. He sometimes declared he "should certainly break down; every man must fail at some time, and *his* hour had come."[3] Cicero has recorded of himself, that he never entered upon an oration, without experiencing, in the outset, a similar nervous embarrassment.

We have thus designated some of the elements of Choate's forensic eminence. His success has been, in some quarters, made a ground of reproach. It has been said that his eloquence, cast into the scales of justice like the sword of the conqueror, has disturbed the even balance; making a specious pretext outweigh the real reason, inflaming the imagination and seducing by the arts of persuasion; thus winning from Astræa verdicts and even judicial opinions by the unconscious spell of eloquence, which otherwise would not have been, and of right ought not to have been, rendered.

It may be remarked, in the first place, that the evil is exaggerated. Choate, with all his powers, was *primus inter pares;* and was constantly opposed by champions fit to break a lance with the best, and who were able to meet fact with fact and law with law. If he "whisked away verdicts" (to use the expression of a leader often opposed to him), it was another matter to keep them; and the cool, clear intelligence of the presiding judge could be invoked, and often was successfully appealed to, as a corrective, where the minds of the jury had been unduly swayed by rhetoric art. Still, after due allowance, the ground of complaint will remain, though of diminished magnitude: and it will be admitted, that the causes Choate espoused with the

[1] Vol. i. p. 194. [2] Vol. i. p. 297. [3] Vol. i. p. 286.

jury, derived from his eloquence an undue advantage. We think this was not so, however, with his arguments to the court. They were always powerful, sometimes rhetorical; but nothing could avail with the judicial intelligence, except the absolute force of reasoning. If he got cases, with the court, which ought not to have prevailed, it was because certain elements were brought into the foreground and made the basis of adjudication, while other considerations, which would have given it a different turn, were left in shadow by the opposing advocate. The decision of the court was right, upon the points submitted, and for right reasons. It was more clear, full, decisive, and satisfactory, for the lights of argument shed upon it by the studious learning and ability of eminent counsel.

In this connection, it is to be remembered that the influence of courts of justice upon the particular causes which pass under their cognizance, is incomparably less than the influence they exert upon the great mass of business transactions and social relations which are practically decided by the specimen causes actually tried. Sometimes it has been said that the sums for which verdicts have been rendered at a given term, are not equal to the expenses of the commonwealth, and parties incurred in the trials; as if the inference were, that Astræa had better close her temple, and give up her business as not a paying one. When that should be done, fraud and rapacity would run riot, the social relations would lose their safeguard, the stream of business transactions would be stayed in its course, and the white sails on the sea would be furled. This result would illustrate the mighty influence which causes tried in court have, immeasurably beyond their own special importance, in trying causes out of court, and thus regulating the course of business in the crowded mart and quiet village, and shielding society everywhere with the ægis of justice. It is not, then, which way the verdict goes, nor how much its amount may affect the individual parties concerned, which is of real importance; but what principle does the case settle, and what precedent does it furnish.

Now, in this respect, the abler the advocate, the more he will call out the power of his opponent, the more earnestly will he engage the judicial mind, the more light will thus be shed upon legal principles, and the more luminous and just will be the adjudication of those principles. A great advocate is, then, a great public blessing, however hardly he may bear upon the opposite party in a cause, who is either not prudent or fortunate enough to retain him. Immense, too, is the magnetism of a master-mind of the forum, in attracting talent to this sphere of activity. Listening youth are kindled with emulation; and the trophies of Miltiades will not let them sleep, till they also have mastered forensic argument and eloquence, and won the laurels of the profession. These gifted,

emulous minds, thus attracted to the practice of a high and honorable calling, in due time take their place among the sages of the bench, and contribute to render the law better understood, by a well considered and clear exposition. One great judge or lawyer draws others in his train. Encounters with Mason brought out Webster. It is probable that Choate, the eager, classic student, may have been induced to turn aside from paths of authorship, for which his country was not yet ripe, and give his strength to the forum, by the great display of Webster's powers in the Dartmouth College cause; which was tried while Choate was a student in that institution.

Well may we then accord to Choate's forensic powers the honors of great public usefulness, as well as the laurels of success in art.

As we contemplate the noble growth of an eminent mind, we are naturally led to feel an interest in its early formation and development. How happened it that this person emerged from obscure station and shone with a light to attract the public eye? We are curious to know whether the phenomenon should be ascribed to native talent or peculiar surroundings, or to a combination of these causes; and at what period the lordly nature first showed itself. Thus, the biography of a distinguished person is an intensely interesting theme, often stranger and more fascinating than fiction.

We search the book which forms our caption, to solve these biographical questions. Choate was born in Ipswich, Mass., Oct. 1, A. D. 1799. All that attracts attention in his early days, is that he was athletic and industrious, and the farmers thought it a sad waste of powers, that a lad who could lay stone wall so well should go to college: that he loved the narrative of naval encounters; as what boy does not? that he was fond of books, and particularly of the Bible. When he went to Dartmouth College, his abilities became immediately conspicuous; and he took and maintained the first place in his class. He would seem to have obtained a complete development, in his college days; for his eloquence, thus early, made a most memorable impression; and is spoken of as unsurpassed by his later efforts. He graduated in 1819: was a tutor for one year in the same institution: then applied himself to law; studying, a part of the preparatory three years, in the office of William Wirt, at Washington. Here he had an opportunity of listening to great advocates; and was especially struck with William Pinkney. He was admitted to the Bar in 1823, and practised for five years in Danvers, Massachusetts; during which period, he twice represented the town in the legislature, and, for one year, was a member of the State senate. He made a good alliance in marriage in 1825, with Miss Helen Olcott, daughter of Mills Olcott, Esq., of Hanover, N. H. Professional success did not come at once; and "during the first two or three years, in some seasons of despondency, he seriously debated whether he should not throw up his

profession, and seek some other method of support."[1] Yet he never relaxed his efforts. He again and again passed in review those causes, where he had been unsuccessful, to search for neglected arguments he ought to have adduced, or facts he had omitted to develop. He applied himself sedulously to acquiring the use of that most dangerous weapon, cross-examination; which, if not plied with consummate tact, is most likely to wound the hand which wields it. He always threw all his force and energy of preparation into small cases, as well as large. If a case was worth trying, he deemed it deserving of his best efforts. In his first slow advancement, he was only an illustration of the general rule: for the path to great and permanent success traverses in the outset those hard places, which at once test and develop a man. According to his own rendering of Quintilian, "Nature herself will have no great things hastily formed; in the direct path to all beautiful and conspicuous achievement she heaps up difficulty."[2]

In 1828, Choate removed to Salem, and was soon in full practice; meeting a great success in criminal cases, in which it seemed impossible to obtain convictions against his defence. In 1830, he was elected a member of the national House of Representatives. The office was unsolicited and unexpected. Politics never attracted him like his profession. In 1834, he resigned his seat, and removed to Boston. The novel impression of his eloquence at first retarded his progress in the new forum, and provoked the criticism of Bar leaders, who fancied him too flowery to be sound and logical. They were, too, a little piqued by losing their laurels in contests with the new comer. One of them, who had lost some opinions, through the skill and research of the young advocate in cases argued before the full bench of the Supreme Judicial Court, used to affect forgetfulness of the name of his opponent, styling him "the young man from Salem." There is, no doubt, an allusion to the criticism he encountered, during the first years of his practice in Boston, in a passage in his diary, where he says, "I can very zealously and very thoroughly and *con amore* study and discuss any case. How well I can do so, compared with others, I shall not express an opinion on paper — but if I live, all blockheads which are shaken at certain mental peculiarities, shall know and feel a reasoner, a lawyer, and a man of business."[3]

In 1841, Choate was elected United States Senator, in the place of Daniel Webster, who had accepted the office of Secretary of State, under General Harrison. He left the Senate in 1845, heartily tired of politics, and returned to the pursuit of his favorite calling, which he continued with abundant success till 1859, the year of his death.

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[1] Vol. i. p. 19. [2] Vol. i. p. 69. [3] Vol. i. p. 90.

Choate possessed the prime legal qualification of a hearty inclination for juridical science. He did not love it, as a nursing mother, for the sake of the maintenance it afforded, but as the mistress of his homage and affection. "There is," he says, "a pleasure beyond expression, in revising, re-arranging, and extending my knowledge of the law."[1] And, again, as if writing a sonnet "made to his mistress' eye-brow,"[2] he says, "A charm of the study of law is the sensation of advance, of *certainty*."[3]

As a means of success, Choate applied himself diligently to the acquisition of language; reading books, as he says, in order to obtain the *copia verborum*. He succeeded, we think, too well for classic eloquence, if not for harangues to the jury, with whom a redundancy of words may have an imposing effect. It was laughingly said by the lawyers, when the rival dictionaries came out with the boasted addition of several thousand new words, that Choate, with this increase of stock-in-trade, would be overwhelming. We think he would have formed his style better, by studying terseness rather than abundance of words. Of course, the niceties of language, with reference to shades of meaning and even vocal sound, should be carefully regarded by a speaker or writer: but, it must always be remembered, that the expression reflects the thought; and, by attention to the latter, excellence can be best obtained in the former. If an actor study tone and attitude, without directing his attention primarily and chiefly to the sentiment intended to be embodied in expression, he will acquire a forced and artificial style, and produce the painful impression of *vox et preterea nihil*. The style depicts the thought, as the face speaks the mind. The legitimate end of the study of words, gesture, attitude, voice, and look is, that they may thus be rendered free, easy, and truly natural, liberated from the defects of habits often unconsciously acquired, and taught gracefully, harmoniously, and instantaneously to shape themselves to the changes of thought and sentiment intended to be impressed on others.

Choate often used an amusing and preposterous hyperbole, cal-

[1] Vol. i. p. 87.

[2] *As You Like It.* Act 2, sc. 7.

[3] This quality of legal certainty has not always been admitted, and recalls a patent cause we heard tried, upon a preliminary application for an injunction to stop the running of the patented machinery. The machinery was used in a mill; and stopping it, would throw many operatives out of employ in mid-winter, when the weather happened to be very severe. B. R. Curtis, of counsel for the defendant, resisted the motion on the ground of the severity of the weather, and the hardship the operatives would suffer if thrown out of employ, at such an inclement season. Henry H. Fuller, for the plaintiff, replied that, "the law was uncertain, he admitted, gloriously uncertain: but he believed, it did not depend upon the weather." B. R. Curtis claimed, on the other hand, that it did depend on the weather: and the court so adjudged; ordering an account, instead of an injunction, by reason of the severity of the season.

culated to rouse the attention of the jury, and fix some point in their minds by a startling statement: yet making but a poor figure in print. An illustration of this extravagance occurs in a letter to Charles Sumner, in which he says, "Out of Burke might be cut fifty Mackintoshes, one hundred and seventy-five Macaulays, forty Jeffreys, and two hundred and fifty Sir Robert Peels, and leave him greater than Pitt and Fox together."[1] Of such madness as this, it cannot even be said, that "there is method in it."

The same may be remarked of Choate's use of vernacular phrases, and occasionally of those spurious, ephemeral words, which, from time to time, appear in the popular vocabulary, and after a brief run, are cast out, to be trodden under foot of men. Parker mentions "*flabbergasted*," as a term used by Choate, though perhaps in no public address.[2] In a speech in the Senate of the United States, he says: "No human being save one, no man, woman, or child, in this Union or out of this Union," &c.: an expression too colloquial for the dignity of a senatorial address.

It is remarkable, that, though he made Cicero and Demosthenes, especially the oration upon the Crown, his constant study, yet his style exhibits the merits of neither. He himself has beautifully characterized the luminous language of Cicero, "through whose pellucid, deep seas the pearl shows distinct and large and near, as if within the arm's reach."[3] Demosthenes, though fervent and impetuous, was always concise and elegant, and the burning lava tide of his eloquence still glows with the fervor of its first utterance. In this respect there is a wide diversity in orators. With some the effect produced belongs to the hour, and is very much the influence of a mighty living presence. When we look for the spell, afterwards, in the printed page, the words are like the pressed leaves of a former year, still radiant perhaps, but their living glory has departed. Others infuse their very soul into their words, and it still burns there, and kindles the reader with its fire, when the occasion and the man have long passed away. In this respect, Choate's eloquence in print compares unfavorably with the spontaneous, unstudied outbursts of Erskine, where his soul still seems embalmed, and moves us like a living presence. The eloquence of Burke, we are told, only lost by the utterance; and his audience fled from his delivery to avoid being "*Burked:*" though they read with delight in the next day's Gazette, the words they had shunned.

To Choate's eloquence is applicable what Quintilian says of Hortensius, cited by Choate in reference to Webster: *Apparet placuisse aliquid eo dicente quod legentes non invenimus.*[4] Choate was himself aware of the want of adaptation of his oratory to the page of liter-

[1] Vol. i. p. 76.
[2] Reminiscences of Rufus Choate, p. 88.
[3] Vol. i. p. 536.
[4] Vol. i. p. 501.

ature, and "that a style of greater simplicty and severity would be necessary for a writer."[1]

These remarks, however, are by no means without exception. Choate's Eulogy on Daniel Webster, and the Remarks to the Court on the death of that great lawyer, constitute imperishable monuments to the fame, not only of the illustrious dead, but of the then living speaker. The admiring, loving heart of the orator fires that utterance, and propitiates all the muses to lend their graces to his eloquence. The reader will glean, too, from Choate's printed speeches, jewels, scattered here and there, of the first water. What can be more expressive than this description of our Federal government? "Happy and free empress mother of States themselves free, unagitated by the passions, unmoved by the dissensions of any one of them, she watches the rights and fame of all; and reposing, secure and serene, among the mountain summits of her freedom, she holds in one hand the fair olive-branch of peace, and in the other the thunderbolt and meteor flag of reluctant and rightful war. There may she sit forever; the stars of union upon her brow, the rock of independence beneath her feet."[2]

In his excellent Address on the Conservative Force of the American Bar, we find this just and beautiful passage: "True wisdom would advise to place the power of revolution, overturning all to begin anew, rather in the background, to throw over it a politic, well-wrought veil, to reserve it for crises, exigencies, the rare and distant days of great historical epochs. These great, transcendental rights should be preserved, must be, will be. But perhaps you would place them away, reverentially, in the profoundest recesses of the chambers of the dead, down in deep vaults of black marble, lighted by a single silver lamp, — as in that vision of the Gothic King,— to which wise and brave men may go down, in the hour of extremity, to evoke the tremendous divinities of change from their sleep of ages."[3]

Although Choate wrote much, it was generally with an ulterior view to extempore speaking. He quotes the authority of Quintilian, to show the necessity of a habit of writing for the development of thought. "Without this discipline, the power and practice of extemporaneous speech will yield only an empty loquacity — only words born on the lips."[4] Here is a key for the solution of the question of the comparative advantages of extemporaneous and written speech. Thought must not be extemporaneous; or it will lie on the surface. It must be the fruit of patient study, research, and processes of reasoning, which are hardly practicable without the aid of the pen. Where, however, the thought has been

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[1] Vol. i. p. 298.
[2] Vol. i. p. 61.
[3] Vol. i. p. 433.
[4] Vol. i. p. 69.

previously developed, the form of expression may be the offspring of the occasion; and such extemporaneous speaking, by the stimulus it applies, reacts genially upon the powers of thought.

We need not cite his famous sentence in his Eulogy upon Webster, which one sentence alone would fill three pages of the *Law Reporter*, and is often mentioned as the longest sentence in any language. But we think our review would not be complete, if we omitted his beautiful epitome of Webster's life in another briefer sentence, found in his remarks to the court: "The year and the day of his birth; that birthplace on the frontier, yet bleak and waste; the well of which his childhood drank, dug by that father of whom he has said, 'that through the fire and blood of seven years of revolutionary war he shrank from no danger, no toil, no sacrifice, to serve his country, and to raise his children to a condition better than his own;' the elm-tree that father planted, fallen now, as father and son have fallen; that training of the giant infancy in catechism and Bible, and Watts's version of the Psalms, and the traditions of Plymouth, and Fort William Henry, and the Revolution, and the age of Washington and Franklin, on the banks of the Merrimack, flowing sometimes in flood and anger, from his secret springs in the crystal hills; the two district schoolmasters, Chase and Tappan; the village library; the dawning of the love and ambition of letters; the few months at Exeter and Boscawen; the life of college; the probationary season of school-teaching; the clerkship in the Fryeburg Registry of Deeds; his admission to the Bar, presided over by judges like Smith, illustrated by practisers such as Mason, where, by the studies, in the contentions of nine years, he laid the foundation of the professional mind; his irresistible attraction to public life; the oration on commerce; the Rockingham resolutions; his first term of four years' service in Congress, when, by one bound, he sprang to his place by the side of the foremost of the rising American statesmen; his removal to this State; and then the double and parallel current in which his life, studies, thoughts, cares, have since flowed, bearing him to the leadership of the Bar by universal acclaim, bearing him to the leadership of public life,—last of that surpassing triumvirate, shall we say the greatest, the most widely known and admired?—all these things, to their minutest details, are known and rehearsed familiarly."

Choate was an extensive general reader and a faithful classical student; although he pursued the walks of general literature in subordination to his profession. Dr. Channing has paid a noble tribute to books, as friends, with whom we may hold pure and exalted communion. Choate had about six thousand of these friends, in the way of general reading, and some three thousand of a professional order. The former swarmed in the book-shelves of his dwelling, fairly occupying with their serried ranks the whole second story, and constituting that "poor dear library," of which he writes home

so affectionately, while absent on a foreign tour, in 1850. "My heart swells," he says, "to think of you all, and of my poor dear library. Take good care of that."[1] He also refers to it, in beautiful terms, in his diary: "Alas! alas!" he exclaims, "there is no time to realize the dilating and burning idea of excellence and eloquence inspired by the great gallery of the immortals, in which I walk."[2] Although his library was so large, if a book were loaned by his family he immediately inquired for it.

In general literature, he rates Burke as the fourth Englishman, reckoning them thus: Shakespeare, Bacon, Milton, Burke. He speaks also with enthusiasm of Madame de Stael. "My love for her," he says, "began in college, growing as I come nearer to the hour when such tongues must cease, and such knowledge vanish away."[3] He "read Tacitus daily."[4] Of course, he could have only a few words of communion, from time to time, with each member of his illustrious assembly of authors. He would read parts of several, in a morning of relaxation.[5] These general studies he pursued "in those spaces of time which one can always command, though few employ."[6]

If Choate had come upon the stage in a riper period of American literature, he might have become an author. He was, no doubt, keenly sensible of the transient character of the advocate's success, necessarily leaving his fame very much to the loose record of tradition. He had a burning ambition, "that last infirmity of noble mind," if an incentive, without which few great, useful or beautiful achievements have ever been accomplished, may be styled an infirmity. He even laid out the plan of a permanent literary work. In the soliloquy of his diary, he says it is "High time * * to gather up these moments, consolidate and mould them into something worthy of myself, which may do good where I am not known, and live when I shall cease to live—a thoughtful and soothing and rich printed page. * * I would arrest these moments, accumulate them, transform them into days and years of remembrance! To this end I design to compose a collection of papers which I will call *Vacations*. These shall embody the studies and thoughts of my fitful, fragmentary leisure."[7]

In the line of his profession, Choate was a reader of Bentham's Judicial Proof: not being deterred, by the novel method of that deep and original writer, from seizing upon his rich and suggestive thoughts.

Choate gave the Bible its due precedence in his reading. He had intelligence and taste to discern, that in literary excellence, as well

[1] Vol. i. p. 140.
[2] Vol. i. p. 70.
[3] Vol. i p. 158.
[4] Vol. i. p. 90, Diary.
[5] Vol. i. p. 243.
[6] Vol. i. p. 67.
[7] Vol. i. p. 136.

as from being the repository of divine truth, it is the Book ot books. Franklin read to a club of French infidel savans one of the books of the Old Testament; and they were enraptured with its literary merit, not being informed that it was the record of inspiration. Shamefully, indeed, must that education have been neglected, which has passed over the wonder-book of poetry, eloquence and history, as well as revelation, and forgotten to weigh that mighty historic influence in the affairs of men, which has been and ever will be exerted by the Holy Scriptures. Though we leave entirely out of view their sacred character, yet such is their literary grandeur, so vast is the moulding influence they have gradually exerted upon society through the progress of the ages, that no man can be properly called a scholar, who has not conned their contents, and sought to solve the mystery of their influence with all diligence. Choate was both a literary and religious reader of the Bible. In the diary of his tour to Europe, he says, "I mean next to read every day a passage in the Bible, a passage in the Old and in the New Testament, beginning each, and to commit my 'Daily Food.'"[1] The latter book is a concise and excellent collection of gems of Scripture, arranged with a verse of a hymn for every day in the year. Again he speaks of "the Bible — a book which more truly than Chaucer's poetry, may be called a well of English undefiled."[2] In his diary, he says, "I will daily read in the English version at least six verses of the New Testament, with an earnest effort to understand, imbibe and live them." Then follow in abbreviated Latin, heartfelt expressions of penitence, holy aspiration, and purposes of Scripture reading, meditation and prayer.[3]

The above passage was written by Choate when he was at the height of glory and on the pinnacle of fame, in 1845, when he was a member of the United States Senate, as well as crowned with the laurels of legal fame, with the eyes of an admiring nation fastened upon him. Much more deeply are we impressed with the genuineness of such religious fervor, under circumstances like these, than when we may doubt whether it be not the mistaken voice of worldly disappointment, pain, distress or fear. We have another solemn instance that his mind busied itself with spiritual realities; and that those religious interests he had honored in the vigor of his powers, stayed his declining strength. In June, 1859, he set out upon a voyage to Europe, as a means of recovering his wasted health. On the way to Halifax, his son endeavored to interest his mind with anticipations of the scenes of foreign travel. "We must think of that other country," gently replied the dying father. Halifax proved to him "that bourne whence no traveller returns;" for

[1] Vol. i. p. 140. [2] Vol. ii. p. 36. [3] Vol. i. p. 97.

there, on the thirteenth of July, 1859, he fell asleep to waken no more upon earth.

We have occasion also to observe, in the volumes before us, that Choate's ambition was the high and noble aspiration for a grand development, rather than place, power, or "the bubble reputation." These traits of reverence and aspiration fairly prognosticate those great powers and attainments, which can scarcely be expected of minds to whom the great fields of religious expectation and ideal aspiration exhibit no open, inviting prospect. And in no profession is it more needful, than in the pursuit of high legal attainment, to observe and honor the conservative element of religion, that pillar of the State, without which liberty speedily becomes license, or law despotism.

Choate often referred to the Scriptures with great power, in his forensic arguments and other public addresses. Thus in his speech on the judicial tenure, before referred to, he depicts the great and good Judge in most apt and beautiful Scripture phraseology.[1]

No sketch of Rufus Choate would be complete, which omitted the charm of his manner in social intercourse. "And from these conversations of friendship, no man — no man, old or young, — went away to remember one word of profaneness, one allusion of indelicacy, one impure thought, one unbelieving suggestion, one doubt cast on the reality of virtue, of patriotism, of enthusiasm, of the progress of man, — one doubt cast on righteousness, or temperance, or judgment to come."[2]

To him was applicable the encomium in Shakspeare: —

> "A sweeter and a lovelier gentleman —
> Framed in the prodigality of nature,
> * * * * * *
> The spacious world cannot again afford."[3]

In his genial social intercourse, he reminded us of one, whom he also somewhat resembled in subtlety and glow of thought, though in a path of intellectual activity far divergent — Ralph Waldo Emerson. From his college days throughout his career, Choate won the hearts about him by his amenity and kindness. In this he was no respecter of persons, and was equally considerate and unassuming toward every rank and age. He sought to make his juniors prominent in the trial of causes. We remember, when associated with him in a law argument, inquiring of him what points should be touched upon in the opening; being aware that leaders generally like to reserve the glory of the case to themselves, and are chary of the portion of the junior, through fear, sometimes, perhaps, that the junior may open it so wide that the senior cannot close it. But Choate bade

[1] Vol. ii. p. 288. [2] Vol. i. p. 540, Eulogy on Webster.
[3] *Richard Third*, Act 1, Scene 2.

us do all we could. And let the junior do what he might, in Choate's original mode of treating a cause, there was little fear that his field would be pre-occupied or his procedure embarrassed.

Of Choate's politics we forbear to speak. Differing, as we did, *toto cælo*, from the political views of his last years, we prefer to leave that subject to impartial history. We think it, however, but justice to remark, that he impressed us as politically unselfish and sincere.

The friendship between Choate and Webster has so linked together the lives of these illustrious lawyers, that the biography of one cannot be written without referring to the other. Choate's reverence for his great compeer was touching and beautiful. We well remember an occasion, in the Suffolk Law Library, when Choate favored us with an introduction to Webster, while his manner seemed to indicate that he esteemed it as great an honor as an introduction to a crowned head; and indeed it was no less.

A memorable instance of Choate's devoted adherence to Webster occurred at the Baltimore Convention, held in June, 1852, to nominate the Whig candidate for President. Choate exerted all his powers to carry the nomination of Webster. His efforts met with determined opposition, which could not be overcome. The delegates who obstinately held out, offered to concur in the nomination of Choate himself; and such would have been the result, had he not generously declined it. He said he came there to nominate Webster: and he would not allow his name to be used against his friend.[1]

Out of the family circle, to which Choate was ardently attached,[2] he perhaps loved no one so much as Webster: and certainly none of his recorded eloquence equals the tributes to his friend. Both have passed from this transient theatre of mortal life; and, in the places that once knew them, honor and admiration and censure can find them no more.

Let us close this review, by recurring to the last words of Choate's Eulogy on Webster: "My heart goes back into the coffin there with him, and I would pause. I went — it is a day or two since — alone, to see again the home which he so dearly loved, the chamber where he died, the grave in which they laid him — all habited as when

> "His look drew audience still as night,
> Or summer's noontide air,"

till the heavens be no more. Throughout that spacious and calm scene all things to the eye showed at first unchanged. The books

[1] We are surprised to find no mention of this in the volumes before us.

[2] Witness the affecting scene at the death-bed of his daughter Caroline. Vol. i. pp. 44, 45.

in the library, the portraits, the table at which he wrote, the scientific culture of the land, the course of agricultural occupation, the coming-in of harvests, fruit of the seed his own hand had scattered, the animals and implements of husbandry, the trees planted by him in lines, in copses, in orchards, by thousands, the seat under the noble elm on which he used to sit to feel the southwest wind at evening, or hear the breathings of the sea, or the not less audible music of the starry heavens, all seemed at first unchanged. The sun of a bright day, from which, however, something of the fervors of midsummer were wanting, fell temperately on them all, filled the air on all sides with the utterances of life, and gleamed on the long line of ocean. Some of those whom on earth he loved best, still were there. The great mind still seemed to preside; the great presence to be with you; you might expect to hear again the rich and playful tones of the voice of the old hospitality. Yet a moment more, and all the scene took on the aspect of one great monument, inscribed with his name, and sacred to his memory. And such it shall be in all the future of America! The sensation of desolateness, and loneliness, and darkness, with which you see it now, will pass away; the sharp grief of love and friendship will become soothed; men will repair thither as they are wont to commemorate the great days of history; the same glance shall take in, and the same emotions shall greet and bless the Harbor of the Pilgrims and the Tomb of Webster."

ON AN INTRODUCTORY COURSE TO THE STUDY OF THE LAW.[1]

Among the numerous courses attended by the law student in the universities of the European continent, none gratifies his mind more than the "Introductory Course to the Study of the Law," and none indeed is better suited to attenuate the sudden transition from the literary pursuits of the school to the abstractions of the law, from the ardent dreams of a juvenile imagination to the cold calculations of reasoning. Experience shows in what painful disarray young men often fall when, the head and heart full of their classical impressions, they pass *ex abrupto* into courses of lectures, the language of which is entirely unintelligible to them, who are as little acquainted with civil concerns as with the locutions and the forms of the law. The most conscientious submit themselves to go on, groping along during half a year or more, much less by an interest they take in things to which they are strangers, than by a

[1] By Mr. George A. Matile.

reasoned and truly meritorious resignation: hence also the discouragement we often witness among them, an evil which an introductory course would remedy to a great extent, as it would soften the study of the texts of the law and the mnemonics of cases.

Sir Henry Spelman gives us in the preface of his *Glossary*, a very lively picture of his distress when he was sent to the law school.

"Emisit me mater Londinum, juris nostri capessendi gratiâ; cujus cum vestibulum salutâssem, reperissemque linguam peregrinam, dialectum barbaram, methodum inconcinnam, molem non ingentem solum sed perpetuis humeris sustinendam, excidit mihi, fateor, animus."

The following lines of Blackstone contain a truth applicable to all times and countries, and show how much an introductory course would have been useful at his time.

"Not anything can be more hazardous or discouraging than the usual entrance to the study of the law; an inexperienced youth is transplanted to one of our learned universities, with no public direction in what course to pursue his inquiries, no private assistance to remove the distress and difficulties which will always embarrass a beginner. How little is it to be wondered at, that we hear of so frequent miscarriages, that so many gentlemen of bright imaginations grow weary of so unpromising a search, and that so many persons of moderate capacity, confuse themselves at first setting out, and continue ever dark and puzzled during the remainder of their lives."

Justinian was moved by the same idea when, publishing in behalf of beginners the *Institutes*, a short and elementary work, which was to serve as a *manual* for lectures and domestic studies, he wrote the following words:

"Si statim ab initio rudem et infirmum animum studiosi oneraverimus, dicorum alterum, aut desertorem efficiemus, aut cum magno labore, sæpe etiam cum diffidentiâ (quæ plerumque juvenes avertit) serius ad id perducemus ad quod leviore viâ ductus, sine magno labore et sine ullâ diffidentiâ maturius perduci potuisset."

We do not pretend that with such an introductory course, a young man may dispense with entering the law school adequately prepared, for the study of jurisprudence requires long, sound, thorough and well conducted preliminary studies; we only mean to say, that such a course must benefit the students by making their paths smoother, clearer and shorter. After attending such a course, they will present themselves to others, endowed with a general information on jurisprudence, able henceforth to admire its majestic whole, and perhaps to become impassioned for that science, the approach of which is not generally smiling. They will be able to go into the

details, and the danger for their minds to contract narrow and exclusive views will be greatly lessened. If a student, animated with an investigating spirit, comes to a law school sufficiently prepared by a classical education, he cannot fail after finishing his studies to find himself provided with the instruction necessary for practical life; for as soon as he has acquired a taste for this science, the desire for its application will come of itself.

When a man thinks of undertaking a distant journey, he first studies the geography of the unknown country he is going to survey; he wishes to know what is the shortest route to take to arrive at the end of it, and the most profitable manner of travelling over it; he is happy to find a thread to guide him in the labyrinth he has before him.

An introductory course to the study of the law is for the young jurist, what a guide is for a traveller.

Preliminary courses of this kind are given in Europe, not only to law students, but to all young men at their first entrance into the field of the other learned professions, as Theology, Medicine, Philosophy, etc. There is not a single one of these four faculties, jurisprudence included, where introductory courses of that character are not delivered by at least two, sometimes three and four professors, at the choice of the students.

An introductory course to the study of jurisprudence, shows what is law, what are its constitutive elements, its fundamental principles, what is the place it occupies in the sphere of human knowledge, through what bonds it is connected with other sciences, how it originates historically, and how it develops itself scientifically. It shows the law as forming a homogeneous whole, of which all parts are in a close and logical connection with each other. It points out the diverse branches of the law, starting from a common trunk; it marks how they divide and sub-divide themselves again and again, at what period they first have been cultivated, in what direction, and by whom. Further, such a course gives short historical and bibliographical glimpses; it enumerates the principal works both of legislators and jurisconsults, and points out the aid which jurisprudence borrows from accessorial sciences—such as philology, history, metaphysics, mathematics, etc. It goes even as far as to give the student some preliminary ideas on the manner in which he will have to realize in life and practice the abstract notions he learns theoretically; in a word, an introduction aims at giving the centre of the science of law, at tracing its circumference, its radii, its tangents.

We have said that the science of law forms a homogeneous whole of which all parts are intimately connected with each other. This truth is especially demonstrated in the before mentioned introductory course, which shows how erroneous it is to believe that some parts only of jurisprudence can be studied exclusively of the other.

To keep one's self in a corner of a science, and not to become acquainted with its whole domain, under the pretext that there are certain parts which one will never use in the practice, would be to act like a man who in geography would confine himself to the study of his country for the reason that he does not intend to go abroad: like a man who would only study the history of his town, or a tactician who would limit himself to the study of the sieges laid in one country. The above mentioned course further points out the danger into which one so easily falls, by merely sticking to what is called the practical tendency. It is in the nature of things that, as jurisprudence constantly refers to life, the practical side of it should play an important part in its study. But the danger is that by overlooking at what is practical in law, we lower that noble science to the level of a manual profession, and ravish from its study what dignifies it. More than any other age, ours is strongly inclined to utilitarianism, and laws are becoming an object of a rather material study, whilst we never should forget that such a study. not to be fruitless, and even dangerous, must be made by the light of both history and philosophy. From the very beginning it is necessary to show to the student how great is the part law occupies in the world; that there is and must be an uninterrupted chain connecting the past to the present, that the latter cannot be well understood without the former; that it is therefore necessary for him to appropriate the traditions of the past ages, without losing sight of the philosophy of the law, which marks out the fundamental principles of jurisprudence, such as they result from the nature of man as a reasonable being, and determine the mode according to which the relations between men must be established, to be congenial to the idea of justice.

The above suffices to show the nature and the importance of such courses. They already appeared in the programme of the law schools in Germany a hundred years ago, and have been since introduced over all continental Europe even as far as Spain, Greece, and Russia. France has just put them at the head of the courses which are obligatory. They often comprehend what is called *methodology*, viz., the science which is to show to the young man the best way to study, and to the professor the best way to teach profitably; they point out the natural order in which the lectures ought to be attended, in countries as Germany, Switzerland and others, where the students are at liberty to select their lecturers, and make their choice from among the from twenty to forty courses delivered each term in the law faculties. This science of teaching and learning has been considered so important, that it makes in several schools the object of special courses.

The great minister and philosopher, Cousin, who was at the head of the educational department in France, wrote in 1840, a circular

to the rectors of all the law faculties in that country, from which we extract the following words:

"You are aware that in Germany, where jurisprudence is so flourishing, there is not a single faculty which does not possess such courses by the name of 'Encyclopædias of the Law,' I have proposed to the king to establish a special chair for such a course."

His words to the king were as follows:

"I come to propose to Your Majesty to fill up a chasm that has hitherto existed in the teaching of the law. When the young students come to our law schools, jurisprudence is for them a new country, the maps and the language of which are entirely unknown to them. They apply themselves to the study of the various branches of the positive law, without knowing well the place they occupy in the field of the juridical science, and thus it happens, that they are disgusted by the aridity of that special study, or that they contract an antipathy against general views, and take the habit of details. Such a method of teaching is very little favorable to grand and profound studies. Long since, all sound minds have vindicated a preliminary course, the object of which would be to set right, so to speak, the young man in the labyrinth of jurisprudence, a course which would give a general view of all the parts of the juridical science, should mark the special and distinct object of them, and at the same time their reciprocal dependance and the close bond existing between them, a course which would show the general method to be followed in the study of the law with the particular modifications which each part claims; a course, finally, which would make known the important works that the progress of science has produced.

"Such a course would dignify the science in the eyes of youth, by the character of unity it would impress upon them, and have a favorable influence over the labors of the pupils and their moral and intellectual development."

We have seen that his plan has been adopted, and the proposed course been placed at the head of the obligatory courses (in 1840).

To render that study the more easy and complete, many works or manuals have been published on that subject in all the countries of continental Europe, even such as are not peopled by the Germanic and the Roman races, as Russia and Greece.

I do not perceive what objections could be made against such a preliminary course, which experience has shown to be very useful in all countries where it has been adopted. The fact that it is elementary in its nature, cannot be a sound reason for not admitting it in the programme of legal studies. Is not every student to begin with the elements of the science to which he devotes himself; and why should lectures, which show him the field of jurisprudence, its

constituent parts, with their relations and connections, its end, and the best, the surest, and the shortest way to come at it, not be welcomed by the student? It is a matter of surprise to us that the commissioners appointed in England in 1854 to Inquire into the arrangements in the Inns of Court and Inns of Chancery for promoting the Study of Law and Jurisprudence, should have paid so little attention, if any, to that elementary but important branch of legal studies. From what we know, no such introductory course is delivered in any of the law schools of the United Kingdom, except, perhaps, in the University of London. The course of the so-called general jurisprudence might appear to some, at first sight, as coming near to the introduction to the study of the law. But general jurisprudence, in the English system, only comprehends the philosophy of positive law and comparative jurisprudence, which on the continent form two quite separate branches of knowledge. General jurisprudence does not place itself, like the other course we have in view, on the threshold of science, which students cross without stopping, so to speak, thence to go to the detailed study of the various parts of the law.

A CASE FROM THE YEAR BOOKS.[1]

RETAINER OF COUNSEL BY THE YEAR.

Debt on arrears of an annuity, brought by John Bruin, Esquire, against the Abbot of Chester, upon a demand of 40*l*. And he declares that one *R.*, formerly abbot of the same place, predecessor of this same abbot, by his deed granted to him an annual rent of 40*s*., issuing out of his monastry aforesaid, *pro consilio suo eidem R., nuper abbati, et conventui ejusdem loci impenso, et in posterum impendendo:* and shows how at the making of the said deed he was, and yet is, a man learned in the law of the land, and how he had given to the said *R. nuper abbati et conventui consilium suum apud W. in negociis Domus prædictæ agendis, ad proficuum ejusdem Domus;* and afterwards the said *R.* died, and the said *J.*, the now defendant, was elected and made abbot of the same place; and for so much arrears in the life of the said abbot, he (J. Bruin) had brought his action, &c.

Littleton, Serjt. demanded oyer of the deed; *et non potuit habere*, for that it was after imparlance. Wherefore he said that the deed

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[1] M. 39 Hen. VI. fol. 21, pl. 31.

bore date at *J.* in the county of Chester, which is a county palatine, and prayed judgment of the writ brought in Middlesex.

Laicon, Serjt. — The deed was sealed and delivered in the county of Middlesex, where we have brought our action; without this, that it bears date at *J.* in the county of Chester.

Littleton, Serjt. — Now show the deed, that the court may try it, for he pleads that plea to the intent that he may have oyer of the deed, *quod nota*.

Laicon, Serjt. willingly showed the deed to the court to try the issue, but the trial must be peremptory between us.

Littleton, Serjt. — Certainly not, but only answer.

Prisot C. J. — If you had pleaded that it appears before us that the deed bears date in Chester, as if the deed had been enrolled in *hæc verba*, &c., then we would have seen the roll, and peradventure it should be but an answer; for that it appears before us of record; but in this case you do not plead so, to wit, that it appears before us, but you have alleged matter in fact, to wit, that the deed bears date at Chester, which ought to be tried by the deed, for that the deed is not inrolled in *hæc verba*, so that he ought to give day to bring the deed, to try that issue; in which case perhaps it will be peremptory. Wherefore advise you well. Wherefore—

Littleton, Serjt. saith, that as to so much arrears being in arrear from such a feast following, &c., *actio non* &c.; for he says, that before the 20th day of September, a tenth was granted by the clergy of (the province of) Canterbury to the king, to wit, on such a day and year, &c., and the abbot was assigned by such a one, bishop, &c., to be a collector of the said tenths; and he showed to the said *J. B.*, at Chester aforesaid, that the king who now is, had pardoned him all manner of occupations, to wit, to be collector, and many others, &c., and showed a confirmation of the same grant from divers kings, and the said *J.* nuper abbot prayed him to be of his counsel, and there, at Chester aforesaid, he refused. And he prayed judgment if for any arrears being after the said refusal, action, &c.; and as to the arrears being in arrear before, &c., he says that he did not give his counsel to the said abbot and convent in manner, &c.

Moile J. — It seems to me that the count is not good; for he has said and counted that he gave him counsel at Westminster in *negotiis domus agendis*, and does not show how he gave him counsel, nor in what things.

Prisot C. J. — That is not needed; for he is retained with the abbot to give him counsel, and he has said that he has given him counsel in *agendis*, that shall be understood to all things which he wanted, and that is better than to say specially in such a thing and such, &c.; for by that reason he would show all the causes in which he had given him counsel, and that would be very long to do.

Wherefore the count is good enough generally, to wit, that he gave him counsel in *agendis*, &c. And if the defendant says that he did not give him counsel, &c., then the plaintiff shows in what things and matters he has given him counsel, and to that the defendant shall answer; but *prima facia* the count is good generally. *Quod curia concessit.* But it was held by the court that he was bound to say in his count as he has done, to wit, that he has given him counsel, which was to the profit or to the use of the house, or otherwise the counsel will not be good: for the action is not maintainable against the successor upon any contract or writing made by the predecessor, unless its effect come to the profit of the house; because this grant was merely the deed of the abbot, the predecessor, and not the deed of the convent; wherefore he ought to show that the thing wherefore the deed was made, came to the use of the house: as it is of a simple obligation contract, and such like acts by the predecessor solely. But if the action had been brought against the same abbot who made the grant, there it would not have been necessary to show whether he had given him counsel or not; for if the abbot had not asked of him any counsel, yet he should have his annuity; but so it is not against the successor, for if he do not give any counsel, he shall not have that action for those arrears against the successor. And such was the opinion of the court. See the diversity.

Then this question (was raised)—if the predecessor buy certain goods for the use of the house, and that is his intent, and before they come to the use of the house, he dies, so that they do not in fact come to the use of the house, whether that shall charge the successor or not.

Littleton, Serjt.—In obligation made by the predecessor, he shall wage his law, for this that he declares, that the thing wherefore the obligation was made, came to the use of the house.

Danby J.—The successor cannot wage his law in an action of debt brought upon an obligation made by his predecessor. *Quod.*

Moile J. *concessit:* for in that case he declares upon the obligation, as the matter is; and if he wish to declare upon the simple contract against the successor, he shall say that he has an obligation of his predecessor for the said duty, and abate his writ. *Ad quod non fuit responsum.*

Quære, if it be a plea for the successor to say, that he (the plaintiff) has a bond of his predecessor for the duty; for the contrary has been held before: *ideo quære.*

Danby J. held that the first plea went to the whole, to wit, the refusal, because it was his own act. And the opinion of the court was against him. As if I grant an annuity to one until he be beneficed, and then I offer to him a reasonable benefice, which he refuses, that refusal is his own act, yet he shall have an action of *debt* for

the arrears before the refusal; so here: but in a writ of *annuity*, in both cases the refusal is an answer for all, and goes in extinguishment of the whole annuity; for by the refusal the annuity is determined; and therefore the refusal goes to the whole, but not in a writ of debt for the arrears; which proves the annuity is expired; and so is the diversity. *Quod nota.*

Laicon, Serjt. — As to the first plea, to wit, the refusal, he says, that he did not refuse to give him counsel; ready, &c.; and the other the contrary, &c., *et sic ad patriam.* And it ought to be tried by them of the county palatine.

Comberford, Prothonotary, said, that they shall write to the keeper of the palace to try that issue, and when they have tried that issue, all the record will be remanded, and the judgment given in this court; as it is of a voucher in a county palatine, this court shall write to them to try the voucher, or summon the vouchee, and when they have done that, it shall remain in this court, and according thereto they shall proceed here. *Quod nota.*

And as to the last plea, — that the plaintiff did not give to the said *J.*, abbot, and to the convent, his counsel in manner, &c.; he said that to that plea, pleaded in the manner, &c.; *et sic adjudicium. Quod Nota.*

RECENT AMERICAN DECISION.

Supreme Judicial Court of Massachusetts.

Suffolk, January Term, 1862.

GEORGE H. VOSE et al. *v.* ISAAC M. SINGER et al.

Independently of covenants or agreements, there is no right of contribution in this commonwealth between the joint owners, or licensees of a patent right.

CONTRACT, with a prayer for relief in equity and for an account. By the agreed statement of facts it appeared that in March, 1852, the defendants executed to Vose and Southland (the plaintiffs in this action) and to one Perkins an assignment of the exclusive right to use, and to sell to others to sell or use during the continuance of the patent within a certain territory, sewing machines constructed under a patent owned by the defendants—Vose and Southland purchasing and holding under said assignment one undivided half, and Perkins the other undivided half of the interest conveyed thereby. In December, 1852, Perkins assigned his undivided half interest to one Andrews, and subsequently, in 1855, the said undivided half

interest was conveyed to the defendants, who afterwards, and while the patent continued in force, sold sewing machines made by them under said patent right, within the said territory. The number so sold by the defendants exceeded those sold by the plaintiffs in the same territory during the same time by seventeen; and upon these it was claimed that the defendants made large profits, for which they had, though requested, refused to account with the plaintiffs: and thereupon this action was brought. Previous to the assignment to the defendants in 1855, the part owners under the assignment of 1852 had been accustomed to sell and account together for all sales under said assignment and the profits thereon. By the agreement, the court were to draw the same inferences from the facts as a jury might do, and if the plaintiffs could maintain the action in this form or in any form which the court would allow by amendment, the case was to go to an auditor, or master, to ascertain the amount due the plaintiffs; otherwise they were to become nonsuit.

The case was argued by *T. L. Wakefield*, for the plaintiffs, and by *Causten Browne*, for the defendants. The opinion of the court was delivered by

Chapman J. There is not in this country any limitation of the number of persons who may be joint owners of a patent right. In England it is otherwise. English letters patent contain a provision that if they shall at any time be vested in more than twelve persons or partners, they shall become void. But the St. of U. S. of 1836, c. 357, § 11, makes patents assignable, either as to the whole interest or any undivided part thereof, by any instrument in writing; and licenses may also be granted by the patentees or their assignees to as many parties as they please. Many proprietors of patents have availed themselves of the right to make assignments, and grant licenses to a great extent; and there have been, for many years, a great number of persons interested, as part owners or licensees, in the question whether, independently of covenants or agreements, a right of contribution, in any form or to any extent, exists between such parties or any of them. The amount of property and the number of persons to be affected by this question must be very great. The question has arisen, and been propounded to counsel, in many instances; but after having made extensive inquiries, we cannot learn that it has ever before been presented to a judicial tribunal in any form. The learned counsel in this case have acknowledged their inability to find any authority in point, and have argued the question principally by analogy. The prevailing sentiment among patent lawyers, we have reason to believe, is adverse to the right; and many of them are in the habit of advising clients to make provision on the subject, as well between part owners as licensees, by special agreements. The analogies which have been suggested by counsel, and those which have suggested themselves to our own minds, are

quite unsatisfactory; because a patent right, as it exists in this country, is a species of property so unlike every other species, and is made profitable in so great a variety of ways. The authorities cited for the plaintiffs are those which relate to tenancies in common of real estate. But real estate is made profitable either by occupation with or without cultivation, or by renting it. And if either party is dissatisfied with holding it jointly or in common, he may have partition. But there is no provision for partition of patent rights; and they are so diverse in their nature that no general statement can be made as to the manner in which they are made profitable. Perhaps in a majority of cases the value of the right depends upon the peculiar circumstances and skill of the owner. At common law, no right of contribution existed between tenants in common of real estate. By St. 4 & 5 Anne, c. 16, if one tenant collects and receives more than his share of the rents and profits, he is made liable to contribution, and this statute has been adopted in Massachusetts. *Monroe* v. *Luke*, 1 Met. 463; *Calhoun* v. *Curtis*, 4 Met. 413. But the statute has not been held, either in England or here, to extend to patent rights. It may be added, that the law as to the respective rights of part owners of an interest in a patent right should be uniform throughout the United States, and cannot be affected by the law of any particular State in respect to real property.

There is some analogy between a patent right and a right of way. A patent right is a monopoly of a certain way of doing a thing. It is an exclusive right of way, in the region of invention, secured to one for a limited period as a compensation for having first discovered it. It was never held that if one of several owners of a right of way over a tract of land used the way more than the other part owners did, he thereby became liable to them for contribution. The doctrine of contribution has never been held to apply to the use of rights of this character. Yet it would be unsafe to draw any conclusions from this to a patent right, because the analogy is so faint.

There is some analogy between a patent right and a right to take tolls; for the royalty is in the nature of toll for the use of the patented way or method. Both are incorporeal rights; and a patent is sometimes made profitable by simply taking a royalty from those who use the invention, under an assignment or a license. If one tenant in common of a right to take tolls were to receive more than his share, a right of contribution would probably exist on the part of his co-tenant; but it would not be safe to apply the rule to patent rights, because the taking of tolls is simply the receipt of money for the use of the common property, but the use of patent rights and the contracts for royalties usually include other elements. The present case illustrates this remark. Each part owner sells his machines for a price supposed to include a royalty. But he must

first invest money in the purchase of machines. Then he must expend labor, skill, and money in finding purchases. And at the last, he must take the risk of losses. And each of these elements, and several others relating to the proceedings of the other party, must enter into an equitable adjustment of a contribution.

A patent right is a chattel interest; therefore a tenancy in common or part ownership in it is much like tenancy in common or part ownership of other personal property. But the use of a patent right is different from the use of any other property; and therefore it is not safe to follow the rules adopted in regard to the mutual liabilities of part owners of ships, horses, grain, liquor, &c. It would not be safe to conclude that, because the owner in common of a horse is not liable though he retains the exclusive use of him, therefore the part owner of the patent who uses it exclusively is not liable; nor because the tenant in common of the grain or liquor who uses it exclusively and consumes it in using is liable, therefore the part owner of the patent is liable. There is a possibility that the part owner of the patent may so supply the market as to appropriate to himself the whole value of the patent; and, on the other hand, his use of it may have the effect to create a market so extensive as greatly to enhance the value of the whole patent. On the whole, then, we are compelled to reject all arguments from analogy, and look at the question upon its own apparent merits.

There is nothing restrictive in the grant of the defendants to the plaintiffs and Perkins, dated March 29, 1852. It assigns to them, their representatives and assigns, "the sole and exclusive right to use and vend to others to be used (but not to build or make)" the machines in question, within the territory specified. It is agreed that Perkins was the purchaser of one half the right, though this is not indicated in the assignment; and that this proportion of it was repurchased by the defendants from the administratrix of Andrews, to whom Perkins had sold his share. But the language used seems to convey to one as full a right to use and sell the machines as another. It is not in any respect distributive. Terms might easily have been used which would indicate the extent to which each party might use the right, and his liability in case he used it beyond the limitation specified; but such terms are omitted.

There is nothing to restrict the party owning each moiety of the right from selling and assigning that moiety, or any fractional part of it, or as many fractional parts as he pleases. Each may purchase as many machines as he pleases; and having purchased them, he may sell them to others with the right to use and sell them; or may refuse to sell them, and may rent them, or establish manufactories, either alone or in company with others, in which the machines shall be used. Or either party may neglect or refuse to purchase, use, or sell any machines or any rights, or to make his moiety pro-

fitable in any way. The right is thus subject to transfers and subdivisions, and may be used in a great variety of ways. None of the parties interested have any right to control the action of the other parties, or to exercise any supervision over them. It is difficult to see how any equitable right of contribution can exist among any of them, unless it includes all the parties interested, and extends through the whole term of the patent right. And if there be a claim for contribution of profits, there should also be a correlative claim for losses, and an obligation upon each party to use due diligence in making his interest profitable. It is not and cannot be contended that these parties are copartners; but the idea of mutual contribution for profits and losses would require even more than a copartnership. Nothing short of the relation of stockholders in a joint stock company would meet the exigencies of parties whose interests may be thus transferred and subdivided.

But even as between the original parties, as there was no mutual obligation to contribute for losses, or to use any diligence to make the property profitable, and as each party was at liberty to buy, use, and sell machines at his pleasure, and to sell his moiety of the right, or fractional parts of it, we think no obligation arose out of the part ownership, as being legally or equitably incident to it, to make contribution of profits. But in the absence of any contract, we think each party was at liberty to use his moiety as he might think fit, within the territory described. If the defendants have realized any profit in the manner alleged, it has been by investing capital in the purchase of machines, and the use of skill and labor in selling them; and they have taken the risk of losses. Apparently there is no more reason why the plaintiffs should claim a part of the advanced price for which they may have sold their machines, than there would have been for claiming a part of the price if they had sold their right itself for an advance. It may possibly be that the sale of the seventeen machines so far supplies the market that the plaintiff's moiety of the right is greatly reduced in value; but if it be so, the consequence is very remote, and dependant upon a great variety of causes. There have been patented articles in respect to which such a sale would have greatly enhanced the value of the other moiety of the right, by its tendency to create a demand. Such a consequence would also be remote.

These parties must be regarded as having interests which are distinct and separate in their nature, though they are derived from the same contract; and having such interests, with the right to use them separately, they cannot for any legal use of them incur any obligation to each other.

Plaintiffs' nonsuit.

RECENT ENGLISH CASES.

Crown Cases Reserved.

REGINA *v.* THOMAS POYNTON.—Nov. 22, 1862.

Larceny — Stealing letters.

A letter carrier, whose duty it was in case he was unable to deliver any letter to bring it to the post-office on his return from delivery, not having delivered a letter containing money, gave no account of it, and being asked why he had not delivered it, produced it unopened and the coin safe within, from his trousers pocket, stating untruly that the house where it ought to have been delivered was closed. Upon indictment for stealing the letter the jury found him guilty, and that he detained it with the intention of stealing it.

Held, that his dealing with the letter amounted to actual stealing.

Case reserved by POLLOCK C. B.—"Thomas Poynton, a letter carrier, was tried before me at the last assizes for the borough of Leicester, and convicted upon an indictment charging him with having, while employed under the Post-office of the United Kingdom, feloniously stolen, taken, and carried away one post-letter the property of her Majesty's Postmaster-General, containing two half-sovereigns, and addressed as follows:—'Stephen Sullivan, Dealer, Black Horse, Belgrave Gate, Leicester, care of Mrs. Swift.' A second count charged him with embezzling, and a third with secreting, the same letter; and in the fourth count he was charged with larceny of the same letter, both it and the money being laid as the property of Charles Donald Style. On the trial it was proved that a test-letter, addressed as above stated, was prepared by one of the inspectors of the Post-office, and posted at Melton, on the night of the 1st of May. It arrived at the Post-office at Leicester, in due course, on the following morning, and was, among others, sorted to the prisoner for delivery. The letter in question ought to have been delivered by the prisoner at its place of destination between half-past eight and nine in the morning; the letter, however, was not delivered, and the prisoner returned to the post-office, as usual, and reported himself to the postmaster as having finished his delivery. It was the duty of the prisoner, in case there were any letters which for any cause he was unable to deliver, to bring them back to the post-office. On his return from delivery he brought the pouch, which contained four which he had so been unable to deliver, but none of which contained coin. The letter in question was not returned, nor did the prisoner give any account of it. It having shortly

afterwards been ascertained that the letter in question had not been delivered, the inspector who had caused it to be posted asked why he had not delivered it. The prisoner at once produced from his right-hand trousers-pocket the letter in question, which was unopened, and the coin safe within it. Upon being asked why he had not delivered it, the prisoner stated that the house was closed; this statement, however, was proved to be untrue. The prisoner further stated that he was going to deliver it in the afternoon. The jury found that the prisoner detained the letter, and that he did so with the intention of stealing it. I reserved for the consideration of the court the question whether, under the circumstances, the prisoner's dealing with the letter amounted to actual stealing. I directed the jury that if they were satisfied that the prisoner put the letter into his pocket with the intention of stealing or secreting it, he might be convicted. The jury found the prisoner guilty, and stated that they were of opinion that the prisoner detained the letter with the intention of stealing it. I ordered the prisoner to be discharged on giving bail.

Merewether, for the prisoner. — It cannot be denied that at one time the prisoner entertained an intention to steal; but when asked about it he at once produced it. It cannot then be said that he stole it. [POLLOCK C.B.—If a man carries a thing away he does not cure the matter by putting it back again. The letter was in his pocket, where it ought not to have been.] No doubt under the post-office regulations that was an unlawful place for it to be in; but he might have intended to deliver it in the afternoon; and at the most there was evidence of an attempt to steal, but not of the complete offence.

Boden Q. C. (*Mellor*, with him) contrà, were not called on.

POLLOCK C. B.—We are all of opinion that there is no doubt of his conviction being right, and if there had been an opportunity for reconsidering the case after the finding of the jury, it would not have been reserved.

Conviction affirmed.

REGINA *v.* MCATHEY.—Nov. 22, 1862.

Receiving stolen goods — Husband and wife.

A husband and wife were jointly indicted for stealing and receiving, and the jury found the wife guilty of stealing without any constraint on the husband's part, and the husband guilty of receiving the stolen property knowing it to have been stolen by his wife.

Held, that the husband was properly convicted of receiving.

Case reserved at the general quarter sessions for Northumberland.—John and Mary McAthey were jointly indicted for stealing

from the person and feloniously receiving. The jury found that the prisoners were husband and wife, and returned a verdict of guilty upon the first count against the wife for stealing, and of guilty upon the second count against the husband for receiving the stolen property, knowing it to have been stolen. At the request of counsel for the prisoners, the chairman asked the jury, first, whether the female prisoner acted voluntarily with respect to her husband, and they found that she did act voluntarily and without any constraint on the part of her husband; and they were further asked whether the male prisoner received the stolen property from his wife knowing it to have been stolen by her, and they found that he had. Upon this it was objected by counsel for the male prisoner that the case fell within the scope of that of *Reg.* v. *Wardroper*, 29 L. J. M. C. 116, and that the verdict amounted to one of acquittal of the male prisoner. The court granted this case: and the question was whether the male prisoner could be convicted of feloniously receiving property from his wife stolen by her under the circumstances above?

POLLOCK C. B.—The jury have found that the husband received the stolen property from his wife knowing it to have been stolen by her.

Conviction affirmed.

LEVERSON *v.* LANE AND STERNE.—Nov. 7, 1862.

Bill of exchange — Partnership — Acceptance by one partner in name of firm for his separate debt.

If a partner in a firm give an acceptance in the name of the firm in satisfaction of his own separate liability, the presumption is that he uses the name of his firm without authority, and it is incumbent on the person who takes such acceptance to show that the authority existed.

Declaration by drawer of a bill of exchange against the acceptors. The defendant Sterne allowed judgment to go by default. The cause was tried before ERLE C. J. at the London sittings after last Trinity term. The acceptance was in the handwriting of Sterne, and purported to be the acceptance of the firm of Sterne & Lane. Sterne & Lane were partners in the business of a steam-wheel manufactory. The firm were in want of money; and Lane, not being then in a position to find it, wrote to Sterne to borrow £1,000 or more, and to give a bill for the amount. Sterne did not do so, but went to the plaintiff's, and purchased from them diamonds to the amount of £560, giving two bills accepted by himself alone. Sterne then pawned the diamonds for £480, £407 of which he put into the business. One of the two last-mentioned bills was paid,

with Lane's assistance. Sterne, however, not being able to meet the other one, accepted another bill (on which the present action was brought) in his own handwriting, in the name of the firm. It being conceded that Sterne had no authority from Lane to purchase the diamonds, and that the debt was a private one between Sterne and the plaintiffs, the learned judge told the jury that if one partner gave the acceptance of himself and his co-partner in satisfaction of his own separate liability, the presumption was that he used the name of his partner without authority; and that it lay upon the person who took such an acceptance to show that the authority existed. A verdict was found for the defendant.

Bovill Q. C. (*W. D. Seymour Q. C.*, with him), moved for a new trial, on the ground of misdirection, citing the case of *Ridley* v. *Taylor*, 13 East. 175. He also moved on affidavits.

WILLIAMS J. With respect to the first point, that this verdict was unsatisfactory, by reason of certain matters disclosed by the affidavits, we will take time to consider; but, with respect to the point as to misdirection, I think we ought to lose no time in expressing our opinion that my lord summed up with perfect correctness. I do not dispute that in *Ridley* v. *Taylor* there is a dictum of Lord Ellenborough at variance with the ruling of my lord; but that dictum is at variance with all the authorities before and since. In Byles on Bills, it is laid down that in case "the party taking a bill or note of the firm knew, at the time, that it was given without the consent of the other partners, he cannot charge them. And the taking a joint security for a separate debt raises a presumption that the creditor knew that it was given without the concurrence of the other partners." It is in accordance with that, that my lord laid down the law; and there are several authorities for the act. One is a dictum of Lord Eldon in *Bonbonus's* case, in 8 Ves. 542. He says, "This petition is presented upon a principle which it is very difficult to maintain—that if a partner, for his own accommodation, pledges the partnership, as the money comes to the account of the single partner only, the partnership is not bound. I cannot accede to that. I agree, if it is manifest to the persons advancing money that it is upon the separate account, and so, that it is against good faith that he should pledge the partnership, then they should show that he had authority to bind the partnership;" and in the case of *Frankland* v. *M'Gusty*, 1 Knapp. Priv. C. C. 301, the Master of the Rolls lays it down, "I take it to be clear, from all the cases upon the subject, that it lies upon a separate creditor who takes a partnership security for the payment of his separate debts, if it be taken simpliciter, and there is nothing more in the case, to prove that it was given with the consent of the other partners." Now, in the present case, it is plain that upon the evidence, as it stood at the trial, at the time the plaintiff took this acceptance, he was perfectly

well aware that it was given for a separate debt incurred by Sterne in respect of which the firm were not liable. It seems to me, therefore, that it falls within the rule that a party who takes an acceptance under such circumstances is bound to show that the single partner had authority to pledge the credit of the firm for such a purpose. There ought therefore to be no rule.

BYLES J. I am of the same opinion. In Smith's Mercantile Law, it is said, "It would seem that the unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove, by showing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so." My lord's direction was in accordance with the passage in Smith's Mercantile Law.

KEATING J. and ERLE C. J. concurred.

Rule (on the ground of misdirection) refused.

CHAMBERS *v.* MILLER AND OTHERS.—Nov. 20, 1862.

A cheque payable to bearer was presented for payment at a bank: the cashier placed the money on the counter and went away. The bearer commenced counting the money, and while so doing the cashier returned, and said the money could not be paid, the drawer having overdrawn his account. The bearer refused to refund the money. It was thereupon taken from him. In an action for assault and trespass it was

Held, that the property in the money passed at the time the cashier placed the money on the counter, and therefore an action would lie.

This case was tried before ERLE C. J. at the sittings in London after last Trinity Term.

The plaintiff, who was a minor, sued by his next friend.

The declaration contained two counts, the first was a count for an assault, the second in trespass *de bonis asportatis*, and converting the same to his own use.

Pleas—1st. Not guilty.

2d. Traverse of property in plaintiff.

3d. As to so much of the declaration as alleged that the defendants assaulted the plaintiff, that the plaintiff had wrongfully in his possession certain notes and coins of and belonging to the defendants, being the notes, &c., in the declaration mentioned, without the leave and license, and against the will of the defendants, and was about wrongfully and unlawfully to take and carry away the same, and convert the same to his own use, and that the defendants requested the plaintiff to refrain from so doing, which the plaintiff

refused to do, whereupon the defendants *molliter manus imposuerunt*, and took away the said notes, &c., from plaintiff.

4th. A similar plea to so much of the declaration as alleged that the defendants took away from the person of the plaintiff the said notes.

Issue thereon.

It appeared from the evidence that the plaintiff was a clerk in the employ of Messrs. T. & Co., Merchants, Newcastle, and that the defendant Miller was a partner, and the two Armstrongs were manager, and cashier respectively of Messrs. Wood & Co.'s bank at Sunderland. In the month of October, 1861, the plaintiff was sent by his employers to the defendant's bank to cash a cheque for £151 10*s.* 6*d.*, drawn by Messrs. A. & Co. upon the defendants' bank, in favor of Messrs. T. & Co., or bearers.

Armstrong, jr., who was acting as cashier, placed upon the counter, in payment of the cheque, thirty-five five-pound notes, a sovereign and a half-sovereign, and a sixpence. Armstrong then went to another part of the bank, and while he was absent the plaintiff placed the cash in his purse, and was proceeding to count the notes. While he was doing so the cashier returned and said the cheque could not be paid, and he must return the money. The plaintiff declined to do so, and snatching up the notes put them in his coat pocket. The plaintiff was then requested to go into the manager's parlor, where he saw the defendant Miller, who demanded the repayment of the money, and tendered to him the cheque. The bank solicitor was sent for, who also demanded the restoration of the money. Upon his still refusing to restore the money, it was taken from him, and the cheque restored to him.

A verdict was found for the plaintiff, damages £20, leave being reserved to move to enter a verdict for the defendants, the court to be at liberty to draw inferences.

Bovill, *Q. C.*, having obtained a rule on the ground that the property did not pass when the money was placed on the counter,

Overend, *Q. C.* (*Lewars* with him), showed cause.

Bovill, *Q. C.* (*Manisty*, *Q. C.*, and *T. Jones* with him), *contra*.

The arguments appear sufficiently in the judgment.

The following cases were cited: *Price* v. *Neal*, 3 Burr. 1354; *Stephens* v. *Badcock*, 3 B. & Ad. 354; *Wilbraham* v. *Snow*, 2 Saund. 47; *Bell.* v. *Gardiner*, 4 M. & G. 11; *Townsend* v. *Crowdy*, 29 L. J. C. P. 300; *Wilkinson* v. *Johnson*, 3 B. C. 428; *Lucas* v. *Worswick*, 1 Moo. & R. 293; *Martin* v. *Morgan*, Gow, 122, 3 Moore, 655; *Marriatt* v. *Hampton*, 2 Sm. L. C. 237; *Smith* v. *Mundy*, 29 L. J. Q. B. 172.

Erle C. J. after stating the facts of the case, said — the point reserved for us is whether the money was the plaintiff's property. It had been the defendants'. Had it passed to the plaintiff? Prop-

erty passes from a transferor to a transferee, according to the intention of the parties. It may be a matter of gift, then it passes, if accompanied by actual delivery. As to a cheque presented to a banker, he is to consider whether he will pass the property in the money, and take the property in the cheque. The cheque was presented, the money given to the bearer of it, and he counted it. Whilst doing so the clerk goes away, and before the bearer has finished counting it, returns and requests to have the money back. The party to whom he had intended to pass the property, if there had been any mistake in the amount given, or the genuineness of a note, might have pointed it out, and if he had received too much, would have returned it if he had been an honest man. The moment the clerk gave the money to bearer, the property passed. The mistake that was discovered was a mistake between the banker and his customer, and not between the banker and the plaintiff; then he tries to claim a right to revoke that which was irrevocably done, viz., the passing of the property. It is clear that it was the opinion of the jury that the clerk gave the money *animo solvendi*. I think the property passed when the money was given. On that ground it is clear that the plaintiff was right, for the question is between the banker and his client. In *Kelly* v. *Solardi* the policy was void, and the money paid to a party who had no right to it; there was no money at all due, but between the holder of the cheque and the drawers there was money due.

Williams J.—I am of the same opinion. On the facts proved it seems to me there is most satisfactory evidence that the clerk meant to part with, and did part with the possession, and the money was received into the possession of the plaintiff: if that is so, there is a complete transfer of the property. Then it is said that the transaction was not complete, because the plaintiff had not counted the money, and he therefore did not consider that the transaction had come to an end. I think that is no ground for inferring that the transaction was not complete. It is argued, that we ought to look at this counting, as an indication that the plaintiff had not accepted. That appears to me to be founded on a mistaken view of what the occasion was. To constitute an accord and satisfaction in a contract for a payment of money there must be an actual payment. Suppose a contract to pay money on a certain day, and the parties meet and the money is handed over, the receiver goes away, and shortly after the money is stolen from him, — can it be said there would be an obligation upon the debtor to pay over again? Then it has been said that, because the money was paid by mistake, therefore an action for money had and received will lie. I think there is no mistake of facts here, such as to enable the defendants to recover the possession. Here a person acting under the authority of the banker passes the property to the plaintiff on the apprehension that

the plaintiff has presented a genuine cheque, and therefore he paid it. It may be, if he had known all the facts of the case, he would not have paid it; but we cannot go to so remote a distance for evidence on which to alter the facts.

BYLES J.—I am of the same opinion. It seems to me the property in this money passed to the recipient from the banker, and that the cheque was paid. True, it was at the banker's counter, but that is no more than an ordinary table, and I apprehend the same rule applies from whichever side of the counter the money is paid. As soon as the money was laid on that table, it became the customer's money. It has been said, but suppose there had been an objection to one of the notes, as being bad or false. The only consequence of that would be to rescind the transaction so far as not to take it away with him. As to the next question, whether there can be a retraction of the payment, I think it would be a very dangerous thing for us to hold without any authority, and no authority has been pointed out to us, and it would be one that would create great consternation among mercantile circles in the city of London, if it were said that it had been held in Westminster Hall, that a cheque regularly paid over the counter could be treated as unpaid, because the banker, after payment, had discovered that the account between himself and the drawers, was different, from what the banker had supposed. I think it was not paid under a mistake of facts. I entirely withhold my assent from the proposition that the bankers could step forward and pick his customer's pocket of the money which he had just been paid. Where property consists, as it does here, of bank notes, and money with respect to which it is a universal rule of law that property, and possession are inseparable, I entertain no doubt that he can do nothing of the sort. Upon all these grounds I think there was no miscarriage at the trial, and that the plaintiff is entitled to the verdict.

KEATING J.—I think the verdict ought to stand. I cannot doubt as a matter of fact that the cashier parted with the possession and completed the delivery of this money. He counted it out and gave it into the safe custody of the party who was to receive it. He did not annex any condition that he was to count it before he took it away. Suppose he had not counted it, but had taken it away at once. Would it not have passed? I apprehend it would. If it passed I think the other question does not arise. There is no case in which it has been held that the party who has passed property has a right to retake by force that in which the property has passed. It seems to me that is the only question in this case.

Rule discharged.

DODD *v.* BIRCHALL.—Jan. 24, 1862.

Way of necessity — Implied grant — Parol evidence to explain deed— "More or less."

An easement, by implied grant, of communication with a dwelling-house, through land not conveyed therewith, cannot be claimed in virtue of anything short of absolute necessity for the user.

Pyer v. *Carter*, 1 H. & Norm. 916, commented upon.

The quantity of land, claimed by the defendant under a conveyance to him, exactly corresponding with the quantity designated by measurement in the conveyance.— *Held*, that the probability, arising from the relative position of part of this land to neighboring land, that it had been conveyed by mistake, did not enable the plaintiff to show, under the words "be the same more or less," that a smaller quantity was the land conveyed.

The declaration stated, that the defendant broke and entered a messuage and land of the plaintiff, situate No. 1 Church-terrace, Church-road, Battersea, and pulled down, prostrated, and destroyed an inclosure, lean-to, and door of the plaintiff, parcel of the said messuage and land, and blocked up a door of the plaintiff opening into the same, and erected a doorway and door upon the said messuage and land, and kept the same locked up and fastened, over and across a certain passage, parcel of the said messuage and land; by means of which the back entrance of the plaintiff into his wash-house, garden, and water-closet, parcel of his said messuage and land, from his house, and from the highway, was then obstructed, and he was deprived of all entrance thereto, except through one of the rooms of his house, and his house was thereby lessened in value. The second count stated, that the plaintiff was possessed of a dwelling-house and garden, No. 1 Church-terrace, Battersea, in the county of Surrey, and by reason thereof was entitled to a way over certain land from his said house, and from a street called Church Street, into his said garden, and from his said garden over the land to his said house, and to the said street called Church Street; and the defendant, by wrongfully fixing a door across the said land, and wrongfully blocking up and fastening the same, prevented the plaintiff from using his said way, whereby his said house and garden became and were lessened in value, and the plaintiff was inconvenienced in the occupation thereof. Pleas, except as to the trespasses in the first count complained of, so far as they relate to a part of the said messuage, not guilty; secondly, to the first count, except as in the first plea excepted, that the said messuage and land in that count mentioned, except as aforesaid, were not, nor was either of them, the plaintiff's; thirdly, to the residue of the trespasses in the first count, payment into court of 30*s.*; fourthly, to the second count, not possessed; fifthly, to the same, that the plaintiff was not entitled to the said way. Issue on the pleas. The

cause was tried at the Guildford Summer Assizes, 1861, before BLACKBURN J. It appeared that the plaintiff's house stood upon the high road, and had a garden behind it; and behind the garden was the defendant's house, called Park Cottage. A small passage or lane ran from the high road, by the side of the plaintiff's and the defendant's houses, and upon this passage a door opened out of the plaintiff's house, and another into his garden. Just below this door the plaintiff erected a door across the passage, and surmounted it with a lean-to. Both the houses were built before the year 1851, by one Jones, to whom all the premises belonged. In 1851 Jones conveyed Park Cottage to the defendant, the land conveyed being described in the deed to be, in one direction, 87ft. 6in., and the accompanying map showing the part intended to be the strip of land running up alongside part of the plaintiff's house. In 1853 Jones conveyed to the plaintiff, No. 1 Church-terrace, and the conveyance purported to pass to the plaintiff the whole of the passage alongside of his house, including a part already conveyed to the defendant. The effect of this was, that the part of the passage, in which was the door opening into the plaintiff's garden, was conveyed to both the plaintiff and defendant, the conveyance to the defendant being prior in point of time. It was proved, that since his first occupation of the premises the plaintiff, and every prior occupant of the house, had been used to pass into the passage from the door in the side of his house, and by the passage into his garden through the door. This is the only way in which the household menial work could be taken to the out premises, unless by passing through a room used for the habitation of the family. The act complained of by the plaintiff was, that the defendant blocked up the door into the plaintiff's garden, removed the door across the passage, and removed the lean-to. The money paid into court was for the injury done to the plaintiff's wall by removing the lean-to. A verdict was taken by consent for the plaintiff, with 40*s.* damages, and leave for the defendant to move to have the verdict entered for him upon the point of law. In Michaelmas Term,

Shee, *Q. S.* obtained a rule accordingly, calling upon the plaintiff to show cause why a verdict should not be entered for the defendant, on the ground that the plaintiff had not any right of way over the passage leading to the garden gate. Against this rule,

Holl showed cause.—[He contended, in the first instance, that the whole of the 87 feet of passage was not intended to pass, and did not pass, to the defendant.] Secondly, we claim a user in virtue of a reasonable necessity. *Nicholson* v. *Chamberlain*, Cro. Jac. 121; *Pyer* v. *Carter*, 1 H. & Norm. 916, 922. [MARTIN B. —In that case the drain was held to be part of the house.] A drain under the defendant's house cannot be part of the plaintiff's house. [POLLOCK C. B.—A drain is corporeally attached to a house; it is

otherwise with a right of way.] But this claim has been apparently continuous. [CHANNELL B.—It cannot hold unless it has been; but being so will not make it hold. MARTIN B.—I thought at the time, that in the case of *Pyer* v. *Carter* the court went a long way in order to do substantial justice.] (He then cited *Pheysey* v. *Vicary*, 16 M. & W. 484, and *Pennington* v. *Galland*, 9 Exch. 1.) Further: I am entitled to give parol evidence that the land passed. *Quaintrell* v. *Wright*, Bunb. 274; *Longchamps* v. *Fawcett*, Peake, 101; *Anstee* v. *Nelms*, 26 L. J. Ex. 5. (He also cited Gale on Easements, by Willes, c. 4, p. 81, 3d ed.—"Upon the severance of an heritage, a grant will be implied of all those continuous and apparent easements which have in fact been used by the owner during the unity, and which are necessary for the use of the tenement conveyed, though they have had no legal existence as easements, and of all those easements without which the enjoyment of the severed portions could not be had at all.")

Shee, *Q. S.* and *Horace Lloyd* were not called upon to support the rule.

POLLOCK C. B.—I am of opinion that the rule should be made absolute. I do not see how the language of the deed is to be got over; and there is a great difference between a substantial thing, as a conduit or watercourse, and a shadowy incorporeal thing, like a right of way. Speaking for myself, I think to admit the principle on which the argument for the plaintiff is founded would be a most dangerous innovation. The law has, in my opinion, been most carefully settled. There may be cases in which it would seem a hardship to withdraw from the jury the power of deciding what they hold to be the real meaning of an instrument. But in this case we do not feel any strong motive for wishing to leave such a question to them; and on general ground it is always undesirable, where the meaning of a document is plain, that they should be admitted to a share in the decision of a question which it is the object of our procedure to withhold from them.

MARTIN B.—I cannot see how, on ascertaining the rights of the grantor and grantee, we can place ourselves out of the reach of the provisions of the deed. At common law all conveyances except feoffments must be by deed. In order to understand the meaning of the instrument, you should put yourself in the position of the grantor and grantee, and read it with all the knowledge they had at the time upon the subject. Having assumed this position, the writing is to decide the rights of the parties. I listened to Mr. Holl with that attention which the arguments of so able a counsel always deserve and command, but he had no principle on which the proposition for which he contends can be supported. The words of the deed are quite plain. If there has been any mistake it is now without remedy. On the other point, I have already said that I

think the case of *Pyer* v. *Carter* went to the extreme verge of the law. The passages in Gale on Easements, which have been cited, rest more upon the civil than the common law. In the case of two fields divided by an artificial drain, the conveyance of one could not prejudice the common use of the drainage by either; but it is otherwise in the case of a right of way which does not appertain directly to the premises.

CHANNELL B.—I am of opinion that the rule should be made absolute. The plaintiff says, that the words "more or less" in the conveyance are explicable by parol evidence. Now, these words may let in parol evidence where the circumstances show ambiguity in the words, but the measurement is substantially correct as the question stands.

WILDE B.—The first point, which is the more important, is as to the right of way. The plaintiff claims to have a right of way from the grantor. A right of way can only pass by prescription, grant, or necessity. There is no question here of grant or prescription; and there is no reservation in the deed; and therefore Mr. Holl, who argued the case with great ability and candor, placed it upon the third point, to the effect, that the law implies a right of way of necessity under the circumstances of the case. The question is, whether the domestic uses for which this way may be used make it a way of necessity? I think it would be most dangerous to hold that they do. Where a man has used his premises in a certain way for some time, and it can be brought home to the knowledge of the purchaser, the conveyance may be supposed to be made with an intention of reservation on the part of the grantor, and the land passes subject to such a user. But here there are no such facts; and I think it would be most dangerous, the deed being silent on the point, to assume such a reservation between the parties. I did not hear the argument on the other point.

Rule absolute to enter a verdict for the defendant.

BEAUFORT, THE DUKE OF, *v.* ASHBURHAM, THE EARL OF. Jan. 14, 17, 1863.

Where an important witness is dangerously ill, and unable to attend the trial, and it was therefore prudent to examine him on a commission, but on the trial being adjourned the witness recovers and attends the trial, the Court will allow the costs of the commission, as well as those of the attendance of the witness at the trial.

The Court will allow the costs of an expert searching for and translating old documents, where the documents relate to matters in the case, and are pertinent to the issue.

The costs of shorthand-writer's notes of proceedings at a trial are to be borne by the party ordering them.

Hance moved for a rule calling on the plaintiff to show cause

why the master should not review his taxation of costs by omitting certain items.

The case was set down for trial at the last spring assizes for Breconshire, but was postponed until the following summer, when, after one day's trial, it was settled. In April a commission was applied for and sent down to examine a material witness, an old man, who was ill and not expected to live long. He recovered, however, and was examined at the trial. The master allowed the costs of the commission, together with those of the witness's attendance at the trial, and of his son, who was present to take care of him. The second item objected to was a sum of one hundred guineas for instructions for brief, which, with £120 for inspecting documents, it was contended were one and the same sum, and excessive. The third item was a sum of £40 allowed to a Mr. Ulett, an expert, for searching old documents in the Record Office; and it was contended, that this was searching for evidence to get up the plaintiff's case, and not costs between party and party. The fourth item was for £18 for shorthand-writer's notes for the use of counsel.

The Court took time to consult the master.

Erle C. J.—In this case Mr. Hance moved for a rule to show cause why the master should not review his taxation, upon four grounds—1st. There was a very large amount, viz., for preparing the brief. That amount, at first sight, would appear excessively large; but after conferring with the master, and looking at the large amount of details with which the attorney had to deal, including documents extending over many centuries, we are satisfied that was a reasonable charge. The second objection was that Mr. Ulett had been allowed £40 for reading documents. If it had only been searching for documents as evidence Mr. Hance's objection would be well founded; but these were documents relating to matters in the case, and pertinent to the issue to be tried, and including languages with which few people are acquainted. We think the charge for Mr. Ulett's services is admissible. The third objection was to a sum of £37 for the examination by commission of on old man, and also his costs, and those of his son, at the trial. In the month of April he was ill, and apprehensions were entertained of his death. He was therefore examined on a commission. We have had great doubts about this item, but have determined not to send it back to the master on this ground. We think it reasonable to allow the son's costs for attendance to take care of his father at the trial, on account of the age of the old man. Then, was it reasonable that he should be examined in April? He had many years, and some illness; and after what the master has told us, we think it was right, and an act of prudence, on the part of the attorney, to perpetuate this evidence, and therefore do not feel justified

in disallowing these costs. As to the fourth point, which is the least material in point of amount, but most material as one attempting to introduce a new point in costs—namely, to charge on the opposite party the costs of shorthand-writer's notes of the trial. But the rule has always been uniform, that the party ordering a shorthand-writer's note should pay for it. We therefore think that item must be struck out; and, if the other side refuse to abandon this item, a rule will be granted on that point; otherwise there will be no rule.

WILLIAMS, WILLES, and KEATING, JJ., concurred.

Rule refused.

REGINA *v.* TRAIN AND OTHERS.—April 24, 1862.

Highway—Obstruction—Evidence.

Upon the trial of an indictment for a nuisance, caused by the laying down of a tramway in a public highway, evidence in support of the prosecution having been given of accidents, &c., occasioned thereby, the jury interposed, and expressed their opinion that the tramway was a nuisance, an obstruction, and dangerous to passengers. On behalf of the defendants, evidence was offered that the tramway was used by a great number of persons, and that it afforded a cheaper and easier mode of travelling than by the ordinary conveyances:—*Held*, that the finding of the jury amounted to a verdict of guilty; and that the evidence offered on the part of the defendants was immaterial and inadmissible.

The laying down of a tramway is not to be considered as a species of pavement within the meaning of sect. 98 of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120).

This was an indictment found at the Surrey Quarter Sessions, held at Michaelmas, 1861, against George Francis Train, Charles Hathaway, and twelve others, whereof one was the surveyor, and the rest members of the vestry of Lambeth. The indictment was removed by certiorari into this Court, and tried before ERLE C. J., at the Surrey Spring Assizes, 1862. The first count charged that the defendants, on a certain road, part whereof is known by the name of the Kennington-road, and the other part whereof is known by the name of the Westminster Bridge-road, then being the Queen's common highway, &c., unlawfully and injuriously did dig up, entrench, and cut into and cause to be made in the said common highway divers large and deep holes, &c., and caused and procured to be laid down, placed and constructed, upon the said common highway, a certain iron tramway extending for a long distance, &c. along the said common highway, &c. There were other counts charging the defendants with a conspiracy to lay down the tramway, and cause an obstruction in the highway. It appeared at the trial that the tramway, the subject of the indictment, had been laid down with the consent of the vestry of Lambeth, in whom the manage-

ment of the highway is vested by the Metropolis Local Management Act, by the defendants Train and Hathaway, the latter of whom was the foreman of Train. Evidence on the part of the prosecution having been adduced of accidents which had happened in consequence of the laying down of the tramway, the jury interposed, and expressed themselves satisfied that the tramway was a nuisance; that it obstructed to a substantial degree the ordinary use of the highway for carriages and horses, and rendered the same unsafe and inconvenient. On behalf of the defendants, evidence was tendered to show that a great number of persons, amounting to 585,000, had travelled upon the tramway, and that a saving calculated at £10,000 annually was saved to those who used it, and that the carriages running upon it were both larger, more expeditious, and more commodious than the ordinary omnibuses, and that no danger or inconvenience was caused thereby. The learned judge rejected this evidence as being immaterial, and held that the finding of the jury, as above stated, amounted to a verdict of guilty, which was accordingly entered for the Crown against Train and Hathaway, leave being reserved to move to enter the verdict for the defendants if the vestry, by virtue of the Metropolis Local Management Act, were authorized to permit the laying down of the tramway.

BOVILL, Q. C., now moved for a rule nisi to enter the verdict for the defendants Train and Hathaway, or for a new trial, on the ground of misdirection and improper rejection of evidence. The defendants were entitled to an acquittal. The question is, whether what was done amounted to a reasonable and convenient arrangement of the highway for the convenience of the public generally using that highway, and for the accommodation of the traffic passing over it; and the question of misdirection and improper rejection of evidence arises on the same point. In *Rex* v. *Lord Grosvenor*, 2 Stark. 511, which was an indictment for a nuisance in erecting a wharf on the river Thames, ABBOTT C. J. says: "The question is, whether a public right has not been infringed. Much evidence has been adduced on the part of the defendants for the purpose of showing that the alteration affords greater facility and convenience for loading and unloading; but the question is, not whether any private advantage has resulted from the alteration to any particular individuals, but whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the river Thames, has been affected or diminished by this alteration." And further on in his judgment: "The question is, whether if this wharf be suffered to remain, the public convenience will suffer. This case is cited in *Rex* v. *Russell*, 6 B. & Cr. 566, which was also an indictment for a nuisance in a navigable river. There the jury were directed to acquit the defendant if they thought

the abridgment of the right of passage occasioned by the erections, the subject of the indictment, was for a public purpose, and produced a public benefit, and if the erections were in a reasonable situation, and reasonable space was left for the passage of vessels on the river; and the Court held (dissentiente LORD TENTERDEN C. J.) that this direction was proper. This doctrine has since been overruled. In the case of *Rex* v. *Ward*, 4 Ad. & El. 384, where, on the trial of an indictment for a nuisance in Cowes Harbor by the erection of an embankment in the waterway, a finding of the jury that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, amounted to a verdict of guilty. The observations, however, of LORD DENMAN C. J. upon *Rex* v. *Lord Grosvenor*, in delivering judgment, do not clash with the proposition submitted in the present case. "It is evident that in *Lord Grosvenor's case*, which was that of an embankment raised by an individual for his own profit, the only question which he (Lord Tenterden) thought necessary to be submitted to the jury—viz. whether the public had benefited by the alteration made—was plainly confined to such benefits as the public might have derived from it in the exercise of that very right the invasion of which was treated as a nuisance." Nor is *Rex* v. *Morris*, 1 B. & Ad. 441, which was also the case of an obstruction of a road by a private individual, decisive against the present defendants. In *Regina* v. *Betts*, 16 Q. B. 1022, it was held that the building of a bridge partly in the bed of a navigable river is not necessarily a nuisance; that the question, whether in fact it be so or not in a particular instance, is for a jury; and that the verdict negativing actual obstruction was in effect an acquittal. There, in his judgment, LORD CAMPBELL C. J. says—"Looking at the verdict, I think it amounts to a finding of not guilty. According to the authority of Lord Hale to that of Lord Tenterden in *Rex* v. *Russell*, and to the opinion of this Court in *Rex.* v. *Ward*, it is for the jury to say whether an erection of this kind is a damage to the navigation or not. That the utility of such a work to the neighborhood or to the public interests generally may be taken into account as a compensation, is a point on which, with great deference, I cannot concur with the majority of the judges who decided *Rex* v. *Russell*." Obstructions to highways, but which do not amount to a nuisance, are of daily occurrence. The construction of a footpath debars so much of the public as journey on horseback or in vehicles of a part of the highway; and, on the other hand, a paved crossing intended for the convenience of foot passengers is an inconvenience to the former class of travellers. Then, as to the point on which leave was reserved, the Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 98, empowers the vestry "to cause the streets to be paved and repaired in such manner and form, and with such

materials," as they may think proper. Under this clause the vestry had the power of giving a valid assent to the tramway; which may be considered merely as a mode of paving so much of the highway as is occupied thereby.

CROMPTON J.—We have consulted the Lord Chief Justice, before whom the indictment was tried, who informs us that there was nothing like a bargain respecting the terms on which the questions should be reserved; we are consequently at liberty to deal with it as an ordinary case, in which the question arises, whether or not there shall be a new trial; and therefore, unless we already entertain doubts upon the matter, we should raise none. We are of opinion that the conviction was right. Here is an admitted nuisance, unless the case can be brought within the proposition laid down by Mr. Bovill, by which he seeks to distinguish the present from that class of cases which establish the rule, that it is no defence to an indictment for a nuisance to a highway, causing inconvenience to a portion of the public who use it in the ordinary way, that it was committed for the benefit of others not so using it. He contends, that "it is a question for the jury, whether what was done was not a reasonable and convenient arrangement of the highway for the convenience of the public generally using that highway, and for the accommodation of the traffic passing over it." He is thus, as it seems to me, driven, in order to avoid any conflict with the class of cases to which I have referred, to confine his proposition to cases where the arrangement is for the benefit of the public using the highway, and for the accommodation of the traffic passing over it. Now, it appears to me, that admitting this proposition to be true, his case is not brought within its terms, inasmuch as this is clearly not a dealing with, or an alteration of, the highway in the ordinary manner, such as the construction of a footpath, a paved crossing, or the like. Cases might be put, where even such a dealing with a highway, however necessary and advantageous to a portion of the public, would be so complete an obstruction to the remainder of the highway as to amount to a nuisance; but admitting, as I have already said, the proposition to be true, it appears to me that the present case is not brought within it, inasmuch as, so far from being an ordinary use of the highway, what is here complained of amounts to an actual withdrawal of a portion of it from its proper legitimate purposes. The construction of a tramroad, as it seems to me, must necessarily amount to a nuisance on a public highway, inasmuch as such carriages as are calculated to run upon it can neither give nor take space as occasion and necessity may require, like vehicles of the ordinary build, but are immovable from the grooves on which they run; and, however convenient and cheap a mode of conveyance it may be to a particular class of travellers, the class so benefited are not those who

put the highway to its ordinary and legitimate use. I think, therefore, that the principle laid down in *Regina* v. *The Longton Gas Company*, 6 Jur. N. S. 601, applies, and that the legal carrying out of such a scheme as the present can only be effected by the authority of Parliament. It might, perhaps, be desirable that the question should be considered in a court of error; but entertaining, as we do, no doubt upon the point, it would be scarcely consistent with our duty to grant a rule, and then to discharge it for this purpose, particularly as the defendants may contest the matter in another indictment, get the facts stated in a special verdict, and so entitle themselves to the opinion of a court of appeal. Mr. Bovill also took another point (if it deserves the title), and contended that the defendants, protected by the Metropolis Local Amendment Act, might allege, by way of answer to the indictment, that this was but a certain mode of providing for the paving of the highway; but this argument is simply ludicrous. I am, therefore, of opinion that there should be no rule.

BLACKBURN J.—I am of the same opinion. It is clear that this tramway was dangerous, and a nuisance to a great portion of the public using the highway in the ordinary and proper manner. Mr. Bovill's point was, that although primâ facie this might amount to a nuisance, yet it might nevertheless be lawful to alter a highway so as to adapt it to the convenience of the traffic over it; and that such an alteration would not constitute a nuisance, although some inconvenience might be thereby caused to a portion of the public using it. He put, as an instance of such sort of dealing with a highway, the construction of a raised footpath occupying a portion of it, which, although convenient to some might be very much the reverse to others of the community, or the macadamizing or paving of a road, which, however adapted to the purposes of heavy traffic, might prove dangerous to those travelling on horseback; and to some extent his argument is sound, but the point really does not arise here. This was not a proposed alteration of the highway, quà highway, but a scheme to adapt it to a new and substituted mode of carrying on the traffic, and the evidence which was rejected at the trial as immaterial, was not offered for the purpose of showing that the alteration was made for the convenience of the existing traffic, but for the purpose of establishing a new and unaccustomed mode of conveyance, which it is alleged was highly beneficial to the public. Such a question it is not the province of a jury to determine, but should form the subject of consideration in a parliamentary committee, who are the proper tribunal to determine whether such a scheme would be beneficial, and if so, upon what terms, and under what restrictions it should be carried out. It seems to me, therefore, that the proposed evidence was inadmissible, and that there was no misdirection. Upon the second point, I also

agree with my Brother Crompton that it is totally undeserving of serious attention.

MELLOR J.—I also think that there was no misdirection. The moment it was conceded that the tramway was dangerous to persons travelling in carriages or on horseback the case was at an end, inasmuch as the countervailing advantage to a portion of the public, by which they save £10,000 a year, is not such a benefit as to throw into the shade the danger and inconvenience caused to other members of the community. Whether or no such a tramway be calculated to benefit the public generally, is a question which may be some day entertained in the proper place; at present it is sufficient to say that it does not arise.

Rule refused.

REGINA on the Prosecution of BARON LIONEL DE ROTHSCHILD *v.* THE UNITED KINGDOM ELECTRIC TELEGRAPH COMPANY (Limited).—April 24, 1862.

Highway—Obstruction—Posts of Telegraph.

In the case of an ordinary highway running between fences the right of passage prima facie, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are not confined to that part of it which is metalled and kept in repair for the convenience of passengers.

A permanent obstruction, such as the posts of a telegraph, erected on a highway and placed there without lawful authority, whereby the way is rendered less commodious to the public than before, is an unlawful act, and amounts to a nuisance at common law; and the circumstance that the posts were not placed upon the repaired and metalled part of the highway, nor upon an artificially formed footpath, but on the waste on each side of the way, makes no difference, even though a jury might be of opinion that a sufficient space for the public use remained unobstructed.

This was an indictment for a nuisance. The first count charged the defendant with digging up, removing, and making holes in the footway in the south side of the turnpike-road from Beaconsfield to the river Colne, and erecting and placing posts with wires fastened to both sides of the said posts, and obstructing the highway. The other counts charged similar offences elsewhere. At the trial, which took place before Martin B., at the Buckingham Spring Assizes, it appeared that the posts and wires above referred to constituted the apparatus for telegraphic communication between London and other places. During the progress of the trial the learned judge intimated that he should leave to the jury certain questions (which are fully set forth in the judgment), the defendants declined to proceed, and a verdict of guilty was entered against them.

O'MALLEY, Q. C., moved for a new trial, on the ground of misdirection; citing *The Mayor, &c. of Colchester* v. *Brooke*, 7 Q. B. 339;

S. C. 10 Jur. 610; *Rex* v. *Russell*, 6 B. & Cr. 556; *Rex* v. *Tindal*, 6 Ad. & El. 143; *Reg.* v. *Betts*, 16 Q. B. 1022; and *Williams* v. *Wilcox*, 8 Ad. & El. 314.

The judgment of the Court was now delivered by

CROMPTON J.—This case came before the Court in rather an unusual shape. Before the evidence for the prosecution was fully given, my Brother Martin laid down the direction he should give the jury, upon which the defendants seem to have declined going to the jury. My Brother Martin, therefore, reduced his directions to the jury to writing, and the question now is, whether or not such direction amounted to a misdirection. The defendants were indicted for erecting their posts on a high road, so as to obstruct the public in the use thereof, and we determined before giving judgment to hear the case of *Regina* v. *Train*, thinking it possible that the same question might there arise, or that something, at all events, throwing light upon it might be elicited during its progress. Having heard that case, there is nothing to prevent our giving judgment without further delay. My Brother Martin laid down two propositions, and the question is, whether either of them constitutes a misdirection. The first of these propositions was as follows:—"In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences, one on each side, the right of passage or way primâ facie, and unless there be evidence to the contrary, extends to the whole space between the fences; and the public are entitled to the use of the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers." Now, this seems to us a very proper direction. It is urged by Mr. O'Malley that this ruling is not applicable to a place where there is a considerable portion of green sward on either side of the metalled road, which either the owner of the adjoining freehold or the lord of the manor would be entitled, if he thought proper, to inclose. That is the first of two objections taken on behalf of the defendants. But it seems to me that my Brother Martin carefully guards against that. He says, that primâ facie the space between the fences is to be taken as the highway; and this seems to be in accordance with the judgment of LORD TENTERDEN C. J. in *Rex* v. *Wright*, 3 B. & Ad. 681, where he says, "I am strongly of opinion when I see a space of fifty or sixty feet through which a road passes, between inclosures set out under an act of Parliament, that unless the contrary be shown, the public are entitled to the whole of that space, though, perhaps, from economy the whole may never have been kept in repair." The same principle is involved in the decision in *Williams* v. *Wilcox*, and my Brother Martin seems to have laid down the law in unison with these cases. He says, that primâ facie, and in the absence of

evidence to the contrary, the public are entitled to the right of passage over the whole, and are not confined to that part which is metalled for the better convenience of travellers and traffic. Mr. O'Malley was unable, when invited, to say to what definite portion of the road, metalled or otherwise, he held the public to be entitled. He, however, contended that the posts might have been erected on what was in fact no part of the highway, such as a rock, or something of that kind, which might occupy part of the space between the fences, but over or across which no road could possibly exist. But this would not be part of the highway any more than a house similarly placed, built before the dedication of the road. We think, therefore, on the first point, the direction of the learned judge was correct, and that the right of the public extends over the entire highway. The second proposition laid down by the learned judge is a wider one, and it remains to be seen whether it amounts to a misdirection. It is, that "a permanent obstruction erected on a highway, placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act, and a public nuisance at common law; and that if the jury believed that the defendants placed, for the purposes of profit to themselves, posts, with the object and intention of keeping them permanently there, in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such sizes and dimensions and solidity as to obstruct and prevent the passage of carriages and horses or foot passengers upon the parts of the highway where they stood, the jury ought to find the defendants guilty upon this indictment; and that the circumstance that the posts were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the Crown to the verdict." This appears to us also to be substantially a proper direction, inasmuch as the real question is, whether there was a practical, as distinguished by myself, in *Regina* v. *Russell*, from a mathematical nuisance. My Brother Martin appears distinctly to have raised that point, by saying that the posts must be of such size, dimensions, and solidity as to obstruct and prevent the passage of carriages and horses and foot passengers at all. In *Regina* v. *Russell* the jury found there was no practical obstruction; but where there is a practical obstruction on a highway, by which the public are prevented from using it, that is a nuisance according to all definitions of the word, and it makes no difference whether or not enough be still left unobstructed for the use of the public; or whether the obstruction is placed on that part of the road which is neither metalled nor repaired for the purposes of traffic. In *Rex* v.

Wright, Lord Tenterden laid it down that the public are entitled to the entire space on either side of the highway, as he says, for the benefit of air and sun. We must take it now that the jury found the defendants guilty upon these facts, and that the posts were of such size and solidity as to create an obstruction, and amount to a nuisance. It was further objected by Mr. O'Malley that certain of the posts appeared actually to have stood upon parts of the road which were inacccessible to travellers; but, supposing this to be the case, it would be no use to the company to have these few isolated posts left standing at different spots along the line of road; and if they wished to keep them, they should have contended at the trial that some of these posts did not come within the rule laid down by the learned judge. We think, therefore, that with respect to these few posts, which may possibly have excepted from the rule, it would be useless to grant a rule.

BLACKBURN J. concurred.

Rule refused.

Notices of New Books.

A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS; Comprising a Summary Account of the Whole Proceedings in a Suit at Law: Being the Sixth Edition of Mr. Serjeant Stephen's Work under that Title, with Alterations Adapting it to the Present System. By JAMES STEPHEN and FRANCIS F. PINDAR. London: V. & R. Stevens & Sons; H. Sweet; and W. Maxwell. 1860. 8vo. pp. 448.

It is a maxim of law that there is no wrong without a remedy. Ubi jus ibi remedium. And "the most simple of the judicial remedies, which the law affords, and without which it would be, practically, a dead letter, cannot be obtained without the aid of *pleading*." Gould Pl. Preface, ix. 2d ed. The object of pleading is to ascertain by a process of elimination the matters really in controversy between the parties, thus avoiding all discussion and inquiry as to those facts and matters which are not disputed. "The substantial rules of special pleading are founded in strong sense and the soundest and closest logic; and so appear when well understood and explained; though, by being misunderstood and misapplied, they are often made use of as instruments of chicane." Lord MANSFIELD C. J. in *Robinson* v. *Raley*, 1 Burr. 320. "Whoever really understands the important objects of pleading," said Lord ABINGER C. B., "will always appreciate it as a most valuable mode of furthering the administration of justice, though some cases are calculated to create in

the minds of persons unacquainted with the science but a mean opinion of its value." *Fraser* v. *Welch*, 8 M. & W. 634.

Notwithstanding the sweeping changes made by the Common Law Procedure Act, 1852, the substantial part of the old system of pleading is retained, and the reasons given by the Commissioners for retaining it, consist principally in the necessity for ascertaining as speedily and distinctly as may be the relevant questions of law and fact in dispute between the parties, and of excluding from consideration all questions either irrelevant or not disputed, so as to diminish the expense of evidence, and enable the court to decide upon the matters really in dispute, and none other. This is the only end which the system of special pleading was so admirably calculated to attain, namely, to develop the precise point in controversy and present it in a shape fit for decision.

In their preface, the authors say they have chosen the "course of presenting to the profession a Treatise on the Principles of Pleading, for which, as a whole, we ourselves are alone responsible, though it is published in the form of a sixth edition of Mr. Serjeant Stephen's work. In carrying out our design, we have not confined ourselves to the task of leaving out such parts of the original work as seemed inapplicable to the existing system, and adding new enactments and cases; but we have endeavored to correct some inaccuracies which had crept into the later editions, and have also made such other alterations as appeared to us to be necessary." They certainly have made a very readable book, and for the purposes for which it was designed, a valuable one. But the first or second edition of the elegant original has superior attractions for us.

A PRACTICAL TREATISE ON THE STAMP ACT OF JULY 1ST, 1862, AND AMENDATORY STATUTES. By CHARLES EDWARDS. New York: John S. Voorhies. 1863. 8vo. pp. 399.

The Law of Stamps is one of the most repulsive subjects which could be selected by an author for discussion. Mr. Edwards has compiled, principally from English statutes and decisions, a manual which will answer for present use. But it is not a full, exhaustive treatise; nor does it pretend to be. To Tilsley's Treatise on the Stamp Laws, which The Jurist says "is a perfect working-book of reference," the author is evidently largely indebted, as he candidly says in his Preface. This branch of the law will probably ere long undergo very extensive changes. At a future day, a distinct treatise, containing a full exposition of it, embodying the decisions which must necessarily arise, together with a judicious and select statement of the English cases, will be of great practical value.

The familiar rule of the law of Evidence, that the contents of a written instrument, which is capable of being produced, must be proved by the instrument itself, and not by parol evidence, in general is undoubtedly a wise one. But in England, a strict observance of it has too frequently entailed upon parties cruel injustice, in consequence of the stamp laws. In *Alcock* v. *Delay*, 4 E. & B. 664, 665, Lord CAMPBELL C. J. said: "I regret that we must give judgment for the appellants. It is just such a case as used to occur frequently, to the great scandal of the law. As the law now stands, payment for the stamp might have been given during the trial. But we have no choice."

New Publications Received.

A Treatise on the Law of Bankruptcy and Insolvency. By Francis Hilliard. Philadelphia: J. B. Lippincott & Co. 1863. 8vo. pp. 476.

Correspondence on the Present Relations between Great Britain and the United States of America. Boston: Little, Brown & Co. 1862. Paper. 8vo. pp. 153.

Digest of American Cases, Relating to Patents for Inventions, and Copyrights, from 1789 to 1862, including numerous Manuscript Cases, Decisions on Appeals from the Commissioners of Patents, and the Opinions of the Attorney-General of the United States, under the Patent and Copyright Laws; and embracing also the American Cases in respect to Trade-marks. Arranged in Chronological order, with the year in which, and the name of the Judge by whom, decided. By Stephen D. Law. New York: Published by the Author, 62 John Street. 1862. Royal 8vo. pp. 697.

Hotch-Pot.

It seemeth that this word *hotch-pot*, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — Littleton, § 267, 176 a.

A story is told of a clergyman who made the customary prayer at the commencement of a term of court, that he prayed the Almighty "to *overrule* the decisions of this court." Although it was not supposed that the reverend gentleman intended to use the word "overrule" in its technical sense, yet the petition of the prayer was regarded as eminently appropriate, since the presiding justice was not particularly remarkable for the correctness of his decisions.

It is stated in Burns' Ecclesiastical Law, Vol. III. p. 11, 9th ed. that "one notary public is sufficient for the exemplification of any act; no matter requiring more than one notary to attest it." Mr. Brooke thinks it not improbable that Massinger was satirically alluding to some such rule, when, in the drama of the "New Way to Pay Old Debts," written before 1633, Sir Giles Overreach declares,—

> Besides, I know thou art
> A public notary, and such stand in law
> For a dozen witnesses.

Brooke's Notary, chap. 1; quoted in Parsons on Bills and Notes, Vol. II. p. 634, note.

In the Second Part of King Henry VI.

Act IV. Sc. 7, there is a singular line so far as the mere connection of words is concerned:—

"Kent, in the Commentaries Cæsar writ."

In an inventory, made in 1662, of the goods belonging to the parish of Braintree, England, is enumerated a sheet for harlots to do penance in. It appears as if the parish authorities at Braintree, at this period, were desirous of establishing a high standard of morality in their town. Whether the article in question was frequently called into use or otherwise, we are not informed.

By an appeal of death private prosecutors could insist on a second trial for life after an acquittal, and could exercise or withhold according to their caprice, or temper, or cupidity, the divine attribute and royal prerogative of mercy. But such is the force of judicial habit that we find the very distinguished Chief Justice HOLT, in the reign of Queen Anne, declaring from the bench, "I wonder that any Englishman should brand an appeal with the name of an odious prosecution; I look at it as a true badge of English liberty." But after the celebrated case of *Ashford* v. *Thornton*, 1 B. & Ald. 405 (1818), the legislature looked upon this method of prosecution in an entirely different light, and it was abolished by 59 G. 3, c. 46.

In the celebrated case, *Stockdale* v. *Hansard*, 9 A. & E. 1, the Sheriffs of London were imprisoned by the House of Commons for a contempt in doing that, for the *not* doing of which, the like fate would have awaited them at the bar of the Court of Queen's Bench.

In Gibbon's History of the Decline and Fall of the Roman Empire, ch. 50, it is stated that by the law of Mohammed a woman could not be convicted of adultery unless on the testimony of *four male* witnesses; and his successor the Caliph Omar decided, with reference to this law, that all circumstantial evidence, however proximate and convincing, was of no avail, and that the four male witnesses must have witnessed the very act in the strictest sense of the word. This is one extreme. For the opposite, the reader is referred to the case of *Commonwealth* v. *Merriam*, 14 Pick. 518.

The defendant charged the plaintiff with having attempted to burn the defendant's house. WRAY C. J. held that the words were actionable, assigning generally as the reason, that "by such speech the plaintiff's good name is impaired." *Edwards' case*, Cro. Eliz. 6.

In *Baker* v. *Pierce*, as reported by Lord Raymond, 960, HOLT C. J. said: "I remember a story told by Mr. Justice TWISDEN, of a man that had brought an action for scandalous words spoken of him; and upon a motion in arrest of judgment, the judgment was arrested; and the plaintiff being in court at that time said, that if he had thought he should not have recovered in his action, he would have cut his throat."

"About the 14th century it was a sort of fashion to put law matters into French verse. There exist metrical copies of the Statutes of Gloucester and Merton. And a compiler in the reign of Edward I. says he then preferred executing his task in common romance, — that is plain French prose, to translating it into rhymes." Catalogue of the Lansdowne MS. part 2, p. 129.

The keeper of the gaol in Oxford having in his custody one Alice de Droys, condemned for felony, and reprieved for pregnancy, suffered her to go abroad

under the guard of a servant. She making her escape, the master was saved by benefit of clergy, but the servant was hanged. KENNETT'S Paroch. Antiq. vol. 1, p. 234.

"One Brown set forth in libel his descent; that another person in way of defamation, said, he was no gentleman, but descended from Brown, the great pudding-eater, in Kent; but it appearing he was not so descended, but from an ancient family, he that spoke the words underwent the sentence of the court, and decreed to give satisfaction to the party complaining." RUSHWORTH, vol. ii. pt. 2, p. 1055.

"Some critics will have our Doomsday Book so called, not because all our lands are arraigned to appear therein as at a general judgment, but quasi *Domus Dei*, or God's House Book, where the original thereof was anciently entrusted." FULLER'S Pisgah Sight, p. 398.

TWISDEN J. and Lord C. J. WILMOT are reported to have ascribed to Lord HOBART the saying so often repeated in the books, that "a statute is like a tyrant; where he comes, he makes all void. But the common law is like a nursing father; it makes only void that part where the fault is, and preserves the rest." 1 Mod. 35, 36. 2 Wils. 351.

It is often said satirically, though no satire was originally intended, that corporations have no souls. It would seem that no argument is necessary to prove this legal axiom. Chief Baron MANWOOD, however, established it by a syllogism, in which it will not be easy to detect any fallacy. "The opinion of MANWOOD C. B. was this, as touching corporations, that they were invisible, immortal, and that they had no soul; and therefore no subpœna lieth against them, because they have no conscience nor soul: a corporation is a body aggregate: none can create souls but God: but the king creates *them*; and therefore they have no souls. And this was the opinion of MANWOOD C. B. touching corporations." 2 Bulst. 233.

The manner in which Sir John Strange occasionally comments on the opini n of the Court, in his Reports, is quite amusing. To a remark of the Court, he appends the following note: "It was *only* Mr. J. Wright who said this; and see The King *vs.* The Inhabitants, &c. of Bishopside, Trin. T. 1755. B. R. adjudged, '*contra:*' and in reference to another part of the same opinion, he says: 'It was *only* Mr. J. Chapple, who said this: and he was wrong; for the act expressly requires &c.'"

By the Statutes of Westminster 13 Edward I. (1825) any stranger passing a town during the night watch was to be arrested until morning, and then if no suspicion appeared against him, to go quit; but if cause appeared he was to be delivered to the sheriff, and the sheriff to rescue him without damage, and keep him safely till he should be acquitted in due manner.

The Laws on the subject of usury and trusts grew up during the White and Red Rose troubles, in consequence of frauds growing out of the times. SPENCE'S Inquiry, p. 563.

JUSTICES OF THE PEACE. The people anciently elected Conservators of the Peace. The Justices took their origin early temp. Edward III. that they might suppress insurrections, if any should arise through the deposition of Edw. II.; but the appellation *Justice* did not supersede their first name, *Guardian of the Peace*, till, according to some, the 18th,

to others the 34th of Edw. III. At the first institution they were very few; only two and three in a county; by statute 13 Ric. II. not above six. Rich. III. was the first who enabled them to take bail. They were distinguished in the sixteenth century by wearing an agate in a ring, as an appendage to their gold chains. They are described, too, as attired in velvet dresses, with a long train of servants. Their present respectability is modern. Shakespeare says, that they attested the most absurd stories with their signatures. Ray has, in his Proverbs, a Basket Justice; a Jyll Justice; a good forenoon Justice, as opprobrious terms; and George Withers says, that unless poor men carried capons to the Justices at Christmas, they plagued them with warrants. FOSBROKE'S *Antiquities*, vol. i. p. 465, ed. 1843.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
			Returned by
Apple, Antone	Brighton,	January 14, '63,	William A. Richardson.
Barnes, Loring B. (1)	Boston,	" 28, '63,	Isaac Ames.
Barrett, William M.	Fitchburg,	" 19, '63,	Henry Chapin.
Bartlett, Enoch	Chelsea,	" 26, '63,	Isaac Ames.
Bickford, Jonathan	Newburyport,	" 21, '63,	George F. Choate.
Blanchard, Charles H. (2)	Boston,	" 7, '63,	William A. Richardson.
Blanchard, William D. (2)	Medford,	" 7, '63,	William A. Richardson.
Brown, Asa (3)	Ipswich,	" 17, '63,	George F. Choate.
Brown, Joshua	Salem,	" 30, '63,	George F. Choate.
Codding, Hosea	Lee,	February 10, '63,	J. T. Robinson.
Culver, Moses E.	Lee,	" 10, '63,	J. T. Robinson.
Currier, Benjamin	West Newbury,	January 14, '63,	George F. Choate.
Davis, Samuel H.	Winchester,	" 16, '63,	William A. Richardson.
Day, Nelson	Boston,	" 9, '63,	Isaac Ames.
Dudley, James H.	Milton,	" 22, '63,	George White.
Edgar, Louisa J. (4)	Roxbury,	" 19, '63,	George White.
Emerson, Isaiah H.	Lawrence,	" 23, '63,	George F. Choate.
Frothingham, George H.	Boston,	" 7, '63,	Isaac Ames.
Gibbs, Dwight	Hadley,	" 1, '63,	Samuel F. Lyman.
Harlow, Thomas D.	Boston,	" 19, '63,	Isaac Ames.
Heard, John A.	Boston,	" 24, '63,	Isaac Ames.
Hillman, Henry	Rowe,	" 31, '63,	Charles Mattoon.
Kelly, John	Watertown,	" 6, '63,	William A. Richardson.
Littler, Charles R.	Lowell,	" 23, '63,	William A. Richardson.
Moran, John	Boston,	" 13, '63,	Isaac Ames.
Murray, C. & Co. (4)	Roxbury,	" 19, '63,	George White.
Murray, Eliza R. (4)	Roxbury,	" 19, '63,	George White.
Patrick, Dexter B.	Waltham,	January 28, '63,	William A. Richardson.
Pease, Lemuel L.	Chelsea,	" 14, '63,	Isaac Ames.
Porter, John W.	Dorchester,	" 12, '63,	George White.
Shirley, Phares (5)	Marblehead,	" 4, '63,	George F. Choate.
Shirley, William H. (5)	Marblehead,	" 4, '63,	George F. Choate.
Spicer, Erastus E.	Montague,	" 23, '63,	Charles Mattoon.
Stone, Leonard A.	Belmont,	" 13, '63,	William A. Richardson.
Thurston, Lyman	Cambridge,	" 12, '63,	William A. Richardson.
Turner, Oliver W. (6)	Newton,	" 14, '63,	William A. Richardson.
Upton, Charles H.	Charlemont,	December 24, '62,	Charles Mattoon.
Wonson, George T. (7)	Gloucester,	January 31, '63,	George F. Choate.
Wonson, Samuel S. (7)	Gloucester,	" 31, '63,	George F. Choate.
Wonson, William S. (7)	Gloucester,	" 31, '63,	George F. Choate.
Wright, John M. (1)	Boston,	" 28, '63,	Isaac Ames.

PARTNERSHIPS, &c.

(1) Wright, Barnes & Co.; (2) Blanchard & Brother; (3) Petition pending; (4) C. Murray & Co. Eliza R. Murray of this firm was member of the late firm of Dowell & Murray; (5) P. & W. H. Shirley; (6) No warrant yet issued; (7) G. T. Wonson & Brothers.